IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 37

BRUCE WILSON,

Petitioner,

v.

MAJOR GENERAL JOHN F. BOHLENDER,
COMMANDER, FITZSIMONS ARMY HOSPITAL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the District Court (R. 60-72) is reported at 167 F. Supp. 791. The opinion of the United States Court of Military Appeals sustaining military jurisdiction over the petitioner (R. 53-60) is reported at 9 USCMA 60 and 25 CMR 322.[1]

[1] The same system of military law abbreviations set forth in Appendix A of the appellee's brief in *Singleton* (No. 22) is used throughout the present brief.

Jurisdiction

The order of the District Court denying the petition for a writ of habeas corpus was entered on November 10, 1958 (R. 72). A notice of appeal to the United States Court of Appeals for the Tenth Circuit was filed on December 2, 1958 (R. 73), and the record on appeal was docketed in that court on December 23, 1958 (R. 74). The case has not been heard, submitted to, or decided by the Court of Appeals. The petition for a writ of certiorari was filed on December 30, 1958, and granted on February 24, 1959 (R. 75), at which time petitioner's motion to proceed *in forma pauperis* was also granted (R. 75; 359 U.S. 906). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Questions Presented

1. Whether a civilian employee of the armed forces may constitutionally be tried by court-martial overseas in time of peace for a non-capital offense.

2. Whether petitioner's trial by court-martial can be sustained on the basis that it represented an exercise of military government jurisdiction in occupied Berlin.

Constitutional Provisions and Statutes Involved

The constitutional and some of the statutory provisions involved appear at pp. 2-4 of respondent's brief herein. Additional statutory provisions referred to throughout the argument are set forth in Appendix B of the *Singleton* brief in No. 22.

Statement

Petitioner, an American citizen, was a civilian employee of the Department of the Army assigned to the Comptroller Division, Berlin Command, in the United States Sector of Berlin (R. 1). He went to Berlin on a passport accrediting him to the United States Army Commander in Berlin, and entered and departed from Berlin from time to time pursuant to military orders during the term of his employment. He, like other civilian employees of the Army in Berlin, was supplied with military housing and exchange facilities (R. 49).

Prior to 1956, he had an excellent record in Federal civilian employment (R. 40-42). In June 1956, when he was 52 years old (R. 26, 29), he was served with charges preferred under the Uniform Code of Military Justice accusing him of various offenses that were wholly non-military in nature (R. 19-22), viz., three acts of sodomy in violation of Art. 125, UCMJ (50 U.S.C. [1952 ed.] §719), and accusing him also of two lewd and lascivious acts with persons under the age of sixteen, and with twice displaying lewd and lascivious pictures to minors with intent to arouse their sexual desires, the latter all in violation of Art. 134, UCMJ (50 U.S.C. [1952 ed.] §728).[2]

One day before the trial, in August 1956, petitioner tendered his resignation from federal employment, but it was not accepted (R. 29-30, 47, 49, 51, 57).

At the trial, on August 21, 1956 (R. 16)—after the first *Covert-Krueger* opinions but before the second ones following rehearing—petitioner entered a plea to the juris-

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[2] Inasmuch as all of the offenses charged were committed prior to the effective date of the 1956 revision of Title 10, U.S.C., we cite only the earlier U.S.C. reference. The substantive content of the Articles in question was not changed in the revision.

diction of the court-martial on the ground that he was a civilian; this plea was overruled after argument (R. 24, 47-52).

Thereupon petitioner pleaded guilty to all the charges and specifications (R. 24), and was duly found guilty accordingly (R. 26).

In the proceedings to determine the sentence, petitioner introduced two stipulations (Def. Ex. D and E; R. 43-46) as to expert testimony concerning his mental condition.

Dr. Jaffe, a German civilian psychiatrist who examined petitioner, would have testified after setting forth his findings that (R. 45) petitioner "should therefore be considered a psychopathic personality on the borderline of schizophrenia."

The other, Capt. Bertram, an American military psychiatrist, concluded (R. 46) that "although Mr. Wilson is not psychotic, he is a psychopathic personality tending toward and on the borderline of schizophrenia."

Both experts stated that petitioner was legally responsible, and able to understand the proceedings and to cooperate in his defense (R. 44, 46).

The maximum penalty for the offenses with which petitioner was charged was confinement at hard labor for 29 years and 8 months (R. 38); the court-martial sentenced him to confinement at hard labor for ten years (R. 39), which the convening authority on review cut to five (R. 8).

After affirmance by a Board of Review (R. 54, 60), the Court of Military Appeals sustained the jurisdiction of the court-martial on the ground that, as applied to petitioner's case, Art. 2(11), UCMJ, was constitutional, notwithstanding anything held in *Reid* v. *Covert*, 354 U.S. 1 (R. 53-60; 9 USCMA 60, 25 CMR 322). The court said in footnote 1

of its opinion (R. 55), "We prefer to reach the question of jurisdiction in this case under the provisions of subdivision 11 of Article 2 rather than consider whether the circumstances obtaining in Berlin constitute that area occupied territory, as contended by Army Government counsel."

The Court of Military Appeals suggested (R. 55), apparently on the basis of the jurisdictional argument at the trial (R. 50), that petitioner "was not subject to the civil or criminal jurisdiction of the Berlin courts by virtue of the provisions of Allied Kommandatura Law No. 7."[3]

Meanwhile, petitioner had been confined in no less than five military institutions (R. 2, 8, 11, 12, 13, 14), the last one being Fitzsimons Army Hospital in Denver, Colorado (R. 1, 5, 10).

While there, he brought the present habeas corpus proceeding, naming the commander of that installation as respondent (R. 1-3).

The district judge denied the petition (R. 60-72), essentially on the grounds set forth by the Court of Military Appeals. The district judge specifically refused to follow the decision of the District of Columbia Circuit in the *Guagliardo* case, now No. 21, this Term, preferring the views of the dissenting judge therein (R. 67-68).

Nothing was said by the district judge regarding the Berlin-occupied territory issue, which was presented by respondent as an alternative ground for denying the writ.

By leave of court, petitioner appealed to the United States Court of Appeals for the Tenth Circuit *in forma pauperis* (R. 73), and perfected his appeal by lodging the record there (R. 74).

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[3] See, however, Resp. Br. 20-21, and p. 100, *infra*.

He sought, and this Court granted, certiorari before judgment in the court below (R. 75-76); and his motion to proceed *in forma pauperis* was also granted (359 U.S. 906).

Summary of Argument

I. Art. 2(11), UCMJ, is separable, so that the constitutional issue in this case must be decided; the argument on this point in the *Singleton* case, No. 22, is incorporated by reference.

II. The prerequisite to the exercise of military jurisdiction is that the accused have a military status, and consequently, with a narrow wartime exception not here applicable, no civilian can constitutionally be tried by court-martial in time of peace regardless of his relationship to the military. On this point also the argument in *Singleton* is incorporated by reference, and here it is significant that in 1957 the Government argued that "For purposes of court-martial jurisdiction, there is no valid distinction between civilians employed by the armed forces and civilian dependents."

III. Apart from a limited number of essentially episodic instances, many of them flagrantly illegal on their face, there is no basis whatever in either history or practice for the peacetime military jurisdiction over civilians employed by or accompanying the forces that is now sought to be asserted.

A. Accurate evaluation of the available military historical materials requires distinctions that the Government's discussion fails to make.

1. First of all, it is necessary to differentiate between episodic instances that reflect only the acts of subordinates

and a settled course of official rulings that represent the considered judgment of higher authority.

2. Next, it is necessary to differentiate between (a) trials by court-martial of civilians accompanying the forces "in the field" in time of war or actual hostilities, which are clearly legal; (b) similar trials in time of peace in areas where no system of civil judicature was in operation, the jurisdiction now in dispute; (c) similar trials in time of peace in areas where the civil courts were functioning, the legality of which the Government does not attempt to defend; and (d) similar trials of civilians wholly unconnected with the forces, which were always illegal.

3. It is similarly necessary to differentiate between wartime military jurisdiction over civilians who aid the enemy or who violate the laws of war, see *Ex parte Quirin*, 317 U.S. 1, and peacetime military jurisdiction over civilians committing ordinary offenses, which is in question here.

4. It is likewise necessary to differentiate between military regulation of civilian activities in the military camp, violation of which may lead to dismissal from employment or ouster from the camp, and the exercise of military jurisdiction through trial by court-martial of civilians who offend against those regulations.

5. Next, it is necessary to distinguish between the power of a court-martial to punish a civilian for obstructing its processes and the power of such a tribunal to try and punish a civilian for committing a military offense. From 1786 to 1901, a civilian who failed or refused to testify before a court-martial violated no law, and in the last named year such acts were made, as they have since remained, purely civil offenses. And the traditional power of a court-martial to punish all contemnors, regardless of

status, does not constitute any exercise of military jurisdiction.

6. It is further necessary to distinguish between persons with civilian status and those who though soldiers bore apparently civilian titles. Musicians, mechanics, farriers and the like were purely soldiers. Some artificers were soldiers, others may have been civilians. But American artillerymen were always soldiers.

7. British analogies must be used with caution, for while American military forces were always under the control of Congress, Parliament seems not to have governed the British Army outside the realm until early in the XIX Century; such control before then was vested solely in the Crown.

8. American naval precedents furnish uncertain guides, primarily because the Articles for the Government of the Navy contained no provision concerning accompanying civilians such as the Articles of War did. Indeed, Congress conferred no such jurisdiction until 1943, and then limited it to time of war or national emergency. Consequently the holding of *Johnson* v. *Sayre*, 148 U.S. 109, is, not that the Navy could try civilians by court-martial, but only that a Navy paymaster's clerk was a person in the naval service.

B. The only known English ruling from the XVIII Century held that there was no military jurisdiction over accompanying civilians in time of peace. *Mostyn* v. *Fabrigas*, 1 Cowp. 161, 175-176. And the British Parliament in 1765 refused to empower military commanders in the North American wilderness to try civilians by court-martial. St. Geo. III, c. 33, §XXV; see discussion in *Singleton* brief.

C. The many military trials of civilians by the Continental Army during the Revolutionary War do not support the peacetime military jurisdiction now asserted. The civilian officials then tried were plainly serving in time of war and "in the field"; the other civilians were either spies, or else inhabitants, tried not under the Articles of War but under special resolves of Congress.

D. Military trials of civilians in the 1790s, at a time when there was endemic conflict between the military and civilian authorities, reflect primarily illegal assertions of military power, and do not establish any authoritatively settled practice, such as the Government now urges, of exercising military jurisdiction only over civilians actually with the army in areas where there is no civil jurisdiction.

1. These trials include some "in the field"—plainly legal; some of civilians not connected with the army at all—plainly illegal; some of accompanying civilians in settled communities—not now sought to be defended; and some of accompanying civilians in the wilderness.

2. These trials, therefore, reflect not a settled legal practice, but simply show the nature of and reason for the conflict between military officers and civil officials that characterized the American frontier in the 1790s. Moreover, the civilian status of about a quarter of the persons whose trials are listed is not clear. And the obvious abuses of authority on the part of the military commanders concerned militate against considering any of their actions as reflecting a consistent course of constitutional interpretation.

3. Many incidents of these trials—their obvious irregularities, the consistent brutality of their sentences—are not such as to establish their legitimacy.

4. None of the foregoing trials were ever approved by higher civil authority; to the contrary, they appear to violate policies formulated by civil authority, notably by President Washington himself. There is no evidence that any of them ever came to the attention of Congress, which long postponed a revision of the Continental Articles of War in order to make them conform to the subsequently adopted Constitution.

5. The foregoing trials are not a safe guide to constitutional interpretation, and were moreover (see Appendix D) regarded contemporaneously as having taken place in time of war.

E. The peacetime military jurisdiction exercised over civilians from 1825 to 1860 was episodic in the extreme—seven such trials in all—and similarly reflected illegality rather than authoritative constitutional interpretation, inasmuch as many of them took place where civil courts were operating.

F. Extensions of military jurisdiction during the Civil War must be regarded with caution; *Ex parte Milligan*, 4 Wall. 2, exposed the patent unconstitutionality of Judge Advocate General Holt's military trials of civilians. He is accordingly not a safe guide as to the extent of military jurisdiction. Nor was the 37th Congress, which enacted the recapture provision ultimately condemned in *Toth* v. *Quarles*, 350 U.S. 11, as well as the plainly unconstitutional military jurisdiction over contractors.

G. Present-day boundaries are fixed, not by the sporadic excesses of the past, but by the considered rulings of the Government's law officers—the Attorney General and The Judge Advocate General of the Army—which condemned those excesses as illegal and unconstitutional.

H. The fact that after three and a half years the Government still accords silent treatment to The Judge Advocate General's post trader ruling is eloqent testimony to the importance of that ruling in the present connection.

I. No constitutional justification was ever offered in 1916 for the extension of military jurisdiction then enacted at General Crowder's urging, nor did he even suggest the existence of a constitutional question. He seems to have rested his proposal on two inarticulate premises: first, that the Constitution did not apply to the acts of American officers overseas; second, that the Fifth Amendment granted court-martial jurisdiction over "cases arising in the land or naval forces." Both of these premises have since been authoritatively disapproved: *Balzac* v. *Porto Rico*, 258 U.S. 298, 312; *Toth* v. *Quarles*, 350 U.S. 11, 14.

J. On the only occasions from 1793 to 1916 when the Attorney General and The Judge Advocate General of the Army gave reasoned consideration to the question whether trials of civilians by court-martial in time of peace contravened constitutional limitations, they answered that question with a resounding affirmative. In 1866, Gen. Holt submitted a brief memorandum that did not mention the Constitution, nor did Gen. Crowder in 1916 discuss any constitutional question. The only reasoned discussions came in 1877, when The Judge Advocate General of the Army recalled the constitutional boundaries of military power to the Attorney General, who had momentarily overlooked them; see full text in Appendix C.

IV. No controlling or indeed persuasive judicial authority sustains the peacetime military jurisdiction over civilians that is now asserted.

A. What was said in *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313, was dictum on its face and moreover referred only to wartime cases.

B. The lower court cases relied on are either not in point, because involving military jurisdiction exercised in wartime; or else unpersuasive. All but one of the decisions dealing with peacetime jurisdiction antedate *Reid* v. *Covert*, 354 U.S. 1, and that one cites the withdrawn opinions therein.

V. The Government's arguments as to the alleged necessity of trying civilian employees by court-martial and the alleged lack of acceptable alternatives are incomplete to the point of being misleading. Under this heading we incorporate by reference, from the *Singleton* brief in No. 22, the discussion regarding the basic inconsistency between *Wilson* v. *Girard*, 354 U.S. 524, and the contentions now being made in support of the military jurisdiction, as well as the suggestion that the Court should call for the production of named recent agreements with foreign countries that appear to cast doubt on assertions now being made.

A. The Government omits to advise the Court that the reason why so many civilian employees are now accompanying the armed forces abroad is purely budgetary—a fact easily established by reference to legislation, committee reports, and appropriation hearings.

B. The Government omits to explain to the Court why, if its civilian employees must be subjected to military discipline, they cannot be incorporated in the armed forces, either voluntarily, by enlistment or commissioning, or, if need be, by draft—as the doctors are.

C. The cases of the civilian employees now before the Court fail to establish any inseparable connection between them and their offenses and the military forces.

1. Grisham, of No. 58, a cost accountant on the payroll of the U. S. District Engineer at Nashville, came to France, rented an apartment in the City of Orleans, and a few weeks later killed his wife there after a cocktail party. He was then held in French custody for over two weeks. Why his offense could not have been treated like any other homicide by an American on French soil, viz., by trial in a French court, is not explained.

2. The present petitioner, described by two doctors as "a psychopathic personality on the borderline of schizophrenia," pleaded guilty to a series of sexual offenses. If those had been committed in the District of Columbia, he would pursuant to Congressional direction have been committed to Saint Elizabeths Hospital as a sexual psychopath. What military reason requires that he be tried by court-martial and then confined for five years in a penitentiary?

3. Guagliardo, of No. 21, was charged with committing two offenses against the United States— larceny and conspiracy—so that Title 18 reached him and he could have been flown back to the United States for trial. He also was held by the local civil authorities. Nowhere is there offered a convincing explanation why his acts could only have been dealt with by an Air Force court-martial.

D. The contentions in support of the jurisdiction simply repeat what was said in 1956 and 1957 and fail to reflect any genuine effort to restudy the problem of law enforcement in respect of civilian employees overseas beyond

"Let's see if we can't keep *Reid* v. *Covert* limited." Not even the espionage chapter of Title 18 has been amended to reach security violations by such employees abroad. The basic approach is still that of the Army Board of Review in the *Singleton* case, that "the necessity for military jurisdiction * * * is sufficient to overcome the requirements of Article III and the Fifth and Sixth Amendments."

VI. Even on the assumption that Berlin is still occupied territory for all purposes, petitioner's trial by court-martial cannot be sustained as an exercise of military government jurisdiction over him. We will assume that Berlin continues under military occupation, and of course military trials may validly be held in such territory.

A. But the Army did not purport to exercise military government jurisdiction over petitioner, his trial was never sustained at any stage on that basis, and it cannot be converted into a military government trial now.

1, 2. Petitioner's status was set forth in the charges preferred against him in terms drawn from Art. 2(11), UCMJ; he was not described either as "a person resident in occupied territory" or as "a person subject to the law of war." And military jurisdiction over him was sustained on that basis; the Court of Military Appeals refused to consider the occupied territory issue. Nor did the habeas corpus court proceed on that basis.

3, 4. It is now too late to invoke the alleged alternative jurisdiction. While the military rule, like the civil one, is that mis-citation of the statutory provision being violated is immaterial, military law nonetheless has consistently held that jurisdiction must be shown to exist at the outset, and that it cannot be supplied by subsequent ratification.

Therefore, once it is conceded that Art. 2(11), under which petitioner was tried as an accompanying civilian, could not validly reach him, then his trial by court-martial cannot be retroactively validated under Art. 18 on the theory that he was simply a resident of occupied territory and as such subject to the law of war.

5. The contrary holding of the Court of Military Appeals in *Schultz*, 1 USCMA 512, which rests on the supposed authority of *Givens* v. *Zerbst*, 255 U.S. 11, cannot be supported. The *Givens* case held that the truth of jurisdictional averments in a court-martial record could be independently established on collateral attack, even though they were not otherwise proved in the court-martial proceedings. The *Givens* case did not hold that, jurisdiction being collaterally challenged, new allegations of jurisdiction that would change the court-martial record could then be substituted and sustained.

6. Of course military trials may validly be held in occupied territory. But no military government jurisdiction was in fact exercised in this case.

B. Indeed, no military government jurisdiction has been exercised in Berlin by the United States since May 5, 1955; there are now no occupation courts there.

C. It follows that any attempt now to exercise a military government jurisdiction limited to American civilians accompanying the armed forces abroad, at the same time excluding German nationals and all other residents of other nationality not connected with the armed forces, would be discriminatory and hence invalid. *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Griffin* v. *Illinois*, 351 U.S. 12, 17. The Due Process Clause limits even the war power. *United States* v. *Cohen Grocery Co.*, 255 U.S. 81.

The discrimination issue will probably not be reached, inasmuch as the military authorities, through and including the Court of Military Appeals, proceeded on the basis that an Art. 2(11) jurisdiction was being exercised.

It should be added that the terms of Allied Kommandatura Law No. 7 specifically provide for an authorization to German courts to try American civilians who accompany the armed forces. Hence a holding that such civilians were not triable by court-martial would in no sense mean that their misdeeds would go unpunished.

ARGUMENT

I. Fairly Construed, Article 2(11) of the Uniform Code of Military Justice Is Separable, So That the Constitutional Issue in This Case Must Be Decided.

If the District of Columbia Circuit in the *Guagliardo* case, No. 21, this Term, was correct in holding that Art. 2(11), UCMJ, is not separable, so that its application to a civilian employee charged with a non-capital crime "cannot be validly carved out of the invalid general spread of that provision" (R. 41, No. 21), then the judgment below in this case, which similarly involved a civilian employee charged with a non-capital crime, must be reversed—unless the Government can show that the present trial was a valid exercise of military government jurisdiction, which, as we indicate below, pp. 90-100, it cannot do.

We believe, however, that Art. 2(11), UCMJ, properly construed, is separable, and that the Court accordingly is required to decide the constitutional issue. On that point, petitioner adopts and incorporates the arguments made on behalf of the relator in the *Singleton-Dial* case; see appellee's brief in No. 22, at pp. 16-23.

II. The Prerequisite to the Exercise of Military Jurisdiction Is That the Accused Have a Military Status, and Consequently (With a Narrow Wartime Exception Not Here Applicable) No Civilian Can Be Constitutionally Tried by Court-Martial Regardless of His Relationship to the Military.

Petitioner's basic position is that, because he was a civilian at all material times, without military status, he was not amenable to trial by court-martial in time of peace.

In order to shorten what at best must necessarily be a long brief, petitioner adopts and incorporates by reference the arguments made on behalf of the relator-appellee in the *Singleton-Dial* case, No. 22, with reference to—

A. The matters decided by *Reid* v. *Covert* and consequently foreclosed here (pp. 24-27);

B. The inapplicable exception subjecting to military law civilians who in time of war are with the armed forces "in the field," i.e., at a time and in the area of military operations against an enemy (pp. 28-33);

C. The general proposition that military jurisdiction depends on military status (pp. 34-38); and

D. The proposition that the Necessary and Proper Clause does not expand Clause 14 so as to include civilians within "land and naval Forces" (pp. 81-103).

Accordingly, petitioner's arguments under the present heading are restricted to one narrow but decisive issue, viz., that for purposes of court-martial jurisdiction there is no difference between civilian dependents and civilian employees.

On that issue, we vouch to warranty one of the Government's basic arguments at the *Covert* rehearing (Supple-

mental Brief for Appellant and Petitioner on Rehearing, Nos. 701 & 713, Oct. T. 1955, Point II, pp. 37-40), viz., that—

> "For purposes of court-martial jurisdiction, there is no valid distinction between civilians employed by the armed forces and civilian dependents."

The Government still appears to be making the same argument today, contending in *Guagliardo* (No. 21) that all civilian employees are triable by court-martial, and urging in *Singleton* (No. 22) that all civilian dependents are similarly triable. Any difference between the two arguments seems to be primarily one of emphasis and fervor; a consecutive examination of the Government's briefs in the two cases leads the reader to infer that The Pentagon is more concerned with military jurisdiction over employees than over dependents.

But that is only an inference; there is no admission that any difference exists between the two classes; and there is no disclaimer of the Government's 1957 position, quoted above. Accordingly, we await with interest the documentation of the announcement (Pet. Br., No. 21, p. 27, note 8) that "The Government does not concede that a civilian employee charged with a capital offense is not amenable to court-martial under the Constitution. See *Grisham* v. *Hagan*, No. 58, this Term."

We believe the factor of civilian status to be decisive in all four cases. And, while we are prepared to incorporate by reference the legal arguments made on behalf of Mrs. Dial in No. 22, in support of that proposition, the history of asserted military jurisdiction over civilian employees is replete with so many more instances that separate treatment of the pertinent historical materials is required in this case.

III. Apart From a Limited Number of Essentially Episodic Instances, Many of Them Flagrantly Illegal on Their Face, There Is No Basis Whatever in Either History or Practice for the Peacetime Military Jurisdiction Over Civilians Employed by or Accompanying the Forces That Is Now Sought to Be Asserted.

This portion of our brief will, unavoidably, be rather long. The fact is—and we say so quite dispassionately, without either heat or resentment—that neither the historical materials adduced by the Government nor the interpretations drawn therefrom in the endeavor to establish a "solid basis" for the exercise of military jurisdiction over civilians, are reliable in any degree.

The materials are incomplete, the inferences drawn therefrom are inaccurate because important distinctions are overlooked, and evidence of authoritative practice in the form of published official rulings is entirely ignored, it would appear systematically so.

We do not propose to make a series of debating points in the pages that follow. Our primary aim in the discussion below is to assist the Court in making an accurate and historically sound evaluation of all available materials, first by emphasizing significant distinctions that serve as guidelines, and then by adducing a mass of additional instances drawn primarily from original sources, many of them still available only in manuscript. Thus, in Appendix A we list more than three times again as many civilians tried by court-martial during the Revolutionary War than the Government cited, while in Appendix B we note numerous instances of military trials of civilians in the 1790's that are not mentioned by the Government at all.

We believe, therefore, that our strictures directed at the unreliability of the Government's "history" cannot fairly be characterized as epithetical, and that they will be found

to be fully supported by the detailed analysis and documentation that follow.

A. *Accurate evaluation of the available military-historical materials' requires distinctions that the Government's discussion fails to make.*

Maitland, the greatest of legal historians, noted that Lord Coke obtained a copy of *The Mirror of Justices*, "and, as his habit was, devoured its contents with uncritical voracity. * * * It would be long to tell how much harm was thus done to the sober study of English legal history." *The Mirror of Justices* (Selden Soc., vol. 7, 1893) xi-x.

The Government has similarly devoured uncritically such historical materials as it presents (Pet. Br., No. 21, pp. 28-61), and in consequence correction of the errors therein also requires a lengthy screed. At least eight vital distinctions are overlooked in the cited discussion, a circumstance that substantially impairs the validity of the conclusions there reached.

1. *It is necessary to differentiate between episodic instances reflecting only the acts of subordinates and a settled course of official rulings representing the considered judgment of higher authority.*

It should hardly be necessary to labor the proposition that the considered judgment of higher authority, reached after mature deliberation, is entitled to more weight in determining the legality of a challenged practice than are earlier instances of action by subordinates that were not submitted to superiors for approval or disapproval.

Yet here the Government appears to place more reliance on scattered episodes than on the subsequent authoritative condemnation of a practice. It relies on 7 trials of sutlers

and the like from 1825 to 1858 (Pet. Br., No. 21, p. 56, note 27), and gives those instances more weight than any of the later Judge Advocate General's opinions to the contrary (*infra*, pp. 65-70), many of which it refuses even to cite. Otherwise stated, the argument seems to be that a jurisdiction sporadically and episodically exerted, without legal scrutiny, establishes the incorrectness of subsequent formal legal opinions which held that this jurisdiction could not be legally exercised.

A fair parallel would be an attempt to demonstrate the legality of trials by military commissions during the Civil War by citing the instances collected in Dig. Op. JAG, 1868, pp. 225-232, and by disregarding their condemnation in *Ex parte Milligan*, 4 Wall. 2, and the consequent elimination of those "precedents" from the 1880 edition of the same Digest.

2. *It is necessary to differentiate between (a) trials by court-martial of civilians accompanying the army "in the field" in time of war or actual hostilities, (b) similar trials in time of peace in areas where no system of civil judicature was in operation, (c) similar trials in time of peace in areas where the civil courts were functioning, and (d) similar trials of civilians wholly unconnected with the forces.*

In disregard of a whole series of published rulings (which it does not cite), the Government (Pet. Br., No. 21, pp. 52-61) insists that the "in the field" limitation is invalid, and that historical evidence establishes the validity of military trials of civilian employees in areas where no system of civil judicature was in operation.

For reasons already set forth in the *Singleton* brief, in No. 22 (and further developed below, pp. 65-70), we

cannot agree that the limitation to "in the field" is capable of thus being ignored and attempted to be verbalized away.

Moreover, in evaluating the persuasive worth of military trials of civilian employees in time of peace, we think it essential to distinguish between those that took place in the wilderness, where the civil courts were not functioning; those that occurred in settled communities, where judicial process ran unimpeded; and those of civilians having no connection whatever with the forces. Certainly the fact that one sutler was tried at Fort Monroe in 1825 and another at Fort Washington, Maryland in the same year (Pet. Br., No. 21, p. 56, note 37) is no precedent for a like trial today, but simply evidence of earlier disregard of the Sixth Amendment. Similarly, the military trials *tempore* Generals Wayne and Wilkinson of civilians unconnected with the Army (*infra*, page 39, and Appendix B), do not infuse such performances with constitutional validity, then or now. And, as we point out in detail below, the numerous similar instances reflect, not a settled military jurisdiction limited to areas where the civil courts could not operate, but a failure on the part of the Army to restrict itself within constitutional boundaries, failure which, as will be shown, resulted in sharp conflicts with civil authority.

3. *It is necessary to differentiate between wartime military jurisdiction over civilians who aid the enemy, and peacetime military jurisdiction over civilians committing ordinary offenses.*

The citation in the argument for the military jurisdiction of the conviction of a civilian by Continental court-martial in 1778 for the offense of counterfeiting (Pet. Br., No. 21, note 25 at p. 41, citing 13 *Writings of Washington* 54), and AW 56 and 57 of 1896 (same brief, note 31, pp. 48-49), blurs a vital distinction between peace and war.

Spies are triable by military tribunal because they violate the laws of war. *Ex parte Quirin*, 317 U.S. 1. They cannot be so tried once the war is over. *Matter of Martin*, 45 Barb. 142, 31 How. Pr. 228.

We show below that the inhabitants tried by court-martial in the Revolutionary War for aiding the enemy in various aspects were, as Washington himself recognized, not tried under the Articles of War. And AW 56 and AW 57 of 1806 that denounced relieving and corresponding with the enemy simply carried forward that purely wartime jurisdiction, which has continued over the years. See AW 45 and AW 46 of 1874; AW 81 of 1916 through 1948; Art. 104, UCMJ; and note Winthrop's showing that this jurisdiction cannot be exercised in time of peace (*138-*142). After all, there being no public enemy in peacetime, the cited provisions at such a period are inoperative by their very terms. The cited articles represent, preeminently, an exercise of the war power, and are thus wholly inapposite here.

4. *It is necessary to differentiate between the military regulation of civilian activities in the military camp, and the exercise of military jurisdiction over civilians who offend against those regulations.*

The argument in favor of the military jurisdiction must, to be persuasive, distinguish between a military regulation of civilians, and military jurisdiction over civilians who violate such regulations as are made.

Today, in very large measure, military commanders regulate the conduct of civilians on their posts in the United States in connection with a variety of activities. Familiar examples are duties relating to facilities such as post exchanges, laundries, restaurants, theaters, and the like. Violation of the applicable regulations may, in proper cases,

lead to a termination of the offending civilian's further employment. But it does not follow for a moment that such civilian employees are subject to trial by court-martial.

Consequently the citations of the early Articles of War regulating the conduct of suttling under pain of dismissal from further suttling (Br. Articles of 1765, Sec. VIII, Art. 1; AW LXIV of 1775; Sec. VIII, Art. 1, of 1776; see Pet. Br., No. 21, p. 33, note 16; p. 36, note 22) are obviously irrelevant.

In this connection it is to be noted that one of the avowed purposes of the 1916 revision of the Articles of War was the elimination of these and similar essentially regulatory provisions, that were more appropriately set forth in Army Regulations, and had no place in a punitive code. See Sen. Rep. 130, 64th Cong., 1st sess., pp. 18, 20, 28, 100.

5. *It is necessary to distinguish between the power of a court-martial to punish a civilian for obstructing its processes and the power of such a tribunal to try and punish a civilian for committing a military offense.*

Much appears to be made, to the extent of speaking of "the broad view which the Continental Congress had of the reach of the court-martial power" (Pet. Br., No. 21, p. 37, note 23), of the circumstance that the earliest codes gave courts-martial power to punish civilians for contempt and for refusing to testify (AW XL of 1775; AW LIV of 1775; Sec. XIV, Arts. 6 and 14, of 1776; see Pet. Br., No. 21, pp. 35-36).

Here again, vital distinctions are being blurred.

(a) AW LIV of 1775 and later Sec. XIV, Art. 6, of 1776, gave to courts-martial power to punish civilians who refused to testify before them when duly called upon to do so.

The Government fails to point out that when, in 1786, Sec. XIV of the Articles of War was amended, the latter provision was repealed.

Therefore, from 1786 until 1901, the failure or refusal of a civilian to testify before a court-martial was not declared criminal by Congress. Finally, in 1901, it was made an offense triable in the civil courts. Sec. 1 of the Act of March 2, 1901, c. 809, 31 Stat. 950; see H.R. Rep. 1853, 56th Cong., 1st sess.; Sen. Rep. 1914, 56th Cong., 2d sess.; cf. *United States* v. *Praeger*, 149 Fed. 474 (W.D. Tex.). And it has remained a civil offense ever since. AW 23 of 1916 through 1948; Art. 47, UCMJ.

(b) The power given a court-martial to punish as for contempt anyone who disturbs its proceedings has however been continued. AW 12 of 1786; AW 76 of 1806; AW 86 of 1874; AW 32 of 1916 through 1948; Art. 48, UCMJ. But that power is to be sharply differentiated from the jurisdiction now asserted. As Winthrop said (*461-*462), "The enforcing of the [contempt] Article in the instance of a civil person is not an exercise of military *jurisdiction* over him. He is not subjected to trial and punishment for a military offence, but to the legal penalties of a defiance of the authority of the United States offered to its legally constituted representative." For, after all, a court-martial is a court of the United States. *Grafton* v. *United States*, 206 U.S. 333.

(c) Finally, we suggest that, before it is sought to generalize regarding the allegedly "broad view which the Continental Congress had of the reach of the court-martial power" (Pet. Br., No. 21, p. 37, note 23), the Continental Congress' refusal to adopt in 1787 the proposal to make civilians in the Northwest Territory even temporarily amenable to military jurisdiction (see the *Singleton* brief in No. 22, at pp. 90-94), had better be, as in the cited reference it has not been, taken into account.

6. *It is necessary to distinguish between persons with civilian status and persons who, although having military status, bear apparently civilian titles.*

Under this heading we deal with two sources of confusion:

(a) There is cited (Pet. Br., No. 21, p. 48), an Act of 1790 that made the existing Articles of War applicable to "commissioned officers, non-commissioned officers, privates, and *musicians*," and the word "musicians" is there italicized as if to indicate that such persons were civilians!

Nothing could be farther from the truth. The fact is that, down through World War I, many, many enlisted men were designated in the statute book by the name of their occupational specialty. The musicians of 1790 were just as much enlisted men as were the privates.

Musicians are similarly met with in the Act of Mar. 3, 1791, c. 28, 1 Stat. 222, as well as in that of Mar. 5, 1792, c. 9, 1 Stat. 241; the latter statute also names farriers, saddlers, and "artificers included as privates."

The Militia Law of May 8, 1792, c. 33, 1 Stat. 271, includes drummers, fifers or buglers, farriers, and trumpeters.

In the Act of May 30, 1796, c. 39, 1 Stat. 483, there are provisions for farriers, saddlers, trumpeters, musicians and artificers. Sappers, miners, musicians and artificers "to serve as privates" are met with in the Act of April 27, 1798, c. 33, 1 Stat. 552. Blacksmiths appear in addition in the Act of Mar. 3, 1799, c. 48, 1 Stat. 749.

Similar provisions continue in our military legislation through the National Defense Act of June 3, 1916, c. 134,

39 Stat. 166; here are listed alphabetically the essentially civilian titles there applied to enlisted men of full military status (§§11, 17-20): bugler, cargador, casemate electrician, chief mechanic, chief planter, cook, coxwain, engineer, fireman, horseshoer, master electrician, master engineer, master gunner, mechanic, musician, packmaster, plotter, saddler, wagoner.

In short, the musicians in the army of 1790 were not civilians in any sense.

(b) It is also urged, primarily on the basis of secondary works, that the artillerymen of the Continental and early United States Army were civilians (Pet. Br., No. 21, pp. 37-39).

In fact, American artillerymen then as now were soldiers.

(i) In a General Order of Sept. 2, 1777 (9 *Writings of Washington* 167), Sergeant Dickinson and Corporal Adair of the Artillery were "sentenced to be reduced to a matross." In that context, very plainly, matross was a rank, because when non-commissioned officers are punished by being eliminated from the service, they are dishonorably discharged or, in late XVIII Century usage, dismissed. The foregoing is entirely consistent with the definition of "matross" in the *Oxford Universal Dictionary* as "A soldier next in rank below the gunner in a train of artillery, who acted as a kind of assistant or mate."

(ii) The earliest American statutes similarly list artillerymen as soldiers and not as civilians. The Militia Act of May 8, 1792, c. 33, 1 Stat. 271, lists gunners, bombardiers and matrosses as enlisted men of artillery. The Act of May 9, 1794, c. 24, 1 Stat. 366, which established the Corps of Artillerists and Engineers, provided for "artificers to serve as privates." The Act of April 27, 1798, c. 33, 1 Stat. 552, authorizing an additional regiment of artillerists and

engineers, speaks of "sappers, miners, musicians and artificers to serve as privates." No later Act for organizing the military forces, and there are many, even faintly suggests that artillerymen are civilians.

(iii) Other contemporary records establish the military character of the American artillery. Thus, on August 18, 1792, General Wayne directed that "Captain Moses Parker will take charge and command of the artillery-armourers and artillery artificers." Wayne Orderly Book, MS., Hist. Soc. Pa., Phila.[1]

On November 8, 1792, duties are ordered for "A Detachment of Artificers from the Legion consisting of 60 non Commissioned Officers and Privates." 34 Mich. Pion. & Hist. Coll. 400. And on Sept. 28, 1794, General Wayne disapproved a sentence of 50 lashes "passed upon a warrant officer," viz., the Master Armourer. *Id.* 556.

See also, with reference to armourers, pp. 42 and 43 below.

(iv) One of the earliest entries in 1 *Orderly Book of the Corps of Artillerists and Engineers* (MS., U.S.M.A.), which begins with May 7, 1795, lists the strength of the garrison as follows (p. 8): 1 captain, 4 lieutenants, 1 sergeant-major, 3 cadets, 4 sergeants, 6 corporals, 9 artificers, 4 musicians, and 67 matrosses. That is to say, a matross was a private of artillery.

It is thus plain that American artillerists were soldiers and not civilians.

(There may have been some artificers who were civilians, in addition to the artificers whose military status is plainly established; see the discussion below, at pp. 41-43.)

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[1] The transcription of this entry appearing at 34 Mich. Pion. & Hist. Coll. 363 is inaccurate.

7. *It is necessary to distinguish British precedents that cannot accurately serve as analogies.*

At this juncture we incorporate by reference the discussion in the Singleton brief in No. 22 at pp. 70-72, which explains why British Articles of War for the royal forces overseas are not precedents in the present situation, inasmuch as Parliament did not undertake to regulate the Army outside the realm until 1803-1813.

8. *It is necessary to distinguish naval precedents which frequently rest on a different basis from military ones.*

Naval precedents are not very illuminating in the present connection.

(a) Despite the doctrine that every ship is to be deemed, at least to some extent, an extension of the national soil (*Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 123), it is not the fact that (Pet. Br., No. 21, p. 54, n. 36) "Since 1800, murders committed outside the United States by persons connected with that branch of the armed services which was most frequently outside the United States—the Navy—have been subject to trial by court-martial." That jurisdiction extended only to persons belonging to a public vessel of the United States, as *Rosborough* v. *Rossell*, 150 F. 2d 809 (C.A. 1), unhappily taught; it did not extend to every enlisted man in the Navy. Not until 1945 was the jurisdiction widened to the extent asserted by the Government in the foregoing quotation. Act of Dec. 4, 1945, c. 554, 59 Stat. 595, amending AGN 6.

(b) Until very recently indeed the Navy had no jurisdiction even over accompanying civilians in time of war in the actual zone of war; see *Hammond* v. *Squier*, 51 F. Supp. 227 (W.D. Wash.). Thereafter the Navy was given such jurisdiction, limited however to time of "war or national emergency." Act of Mar. 22, 1943, c. 18, 57 Stat. 41; 34

U.S.C. [1946 ed.] §1201. Earlier, in 1937, the Judge Advocate General of the Navy ruled that the Commandant of the leased U.S. Navy Base at Guantanamo Bay in Cuba had no jurisdiction whatever to try by court-martial civilians living there. Court-Martial Order 11 of 1937, p. 18.

(c) The citation (Pet. Br., No. 21, p. 62) of the cases of the Navy's paymasters' clerks (*Ex parte Reed*, 100 U.S. 13; *Johnson* v. *Sayre*, 148 U.S. 109; *McGlensy* v. *Van Vranken*, 163 U.S. 694) is actually wide of the mark.

The Articles for the Government of the Navy there considered (R.S. §1624) contained no provision comparable to the contemporaneous Army camp-follower provision (AW 63 of 1874, in R.S. §1342), nor indeed any other provision whatever that purported to subject civilians to trial by court-martial.

This Court's holding, therefore, was, not that naval courts-martial could try civilians, but that, since a paymaster's clerk in the Navy had already been held to be an officer for some purposes (*United States* v. *Hendee*, 124 U.S. 309), he was (148 U.S. at 117) "a person in the naval service of the United States"—and as such subject to naval jurisdiction.

Inasmuch as it is not for a moment suggested that Guagliardo (of No. 21), or this petitioner, or Grisham (of No. 58) are in any sense "persons in the miliary service of the United States," it follows that the cases involving the former paymasters' clerks of the Navy are completely inapposite in the present connection.

(d) Finally (Pet. Br., No. 21, p. 54, note 36), it is sought to bolster the argument in support of the jurisdiction by referring to a popular history of the United States Coast Guard "for examples of public vessels manned by civilian seamen in 1800."

If the attempt there is, by inference from the foregoing, to suggest that the Coast Guard—known prior to 1915 as the U.S. Revenue Cutter Service—exercised court-martial jurisdiction over those civilian crews, then the suggestion is completely misleading. For the fact is that the Revenue Cutter Service, for well over a century, from 1790 when it was founded (§§62-64, Act of Aug. 4, 1790, c. 35, 1 Stat. 145, 175) until 1906 (Act of May 26, 1906, c. 2556, 34 Stat. 200), not only had no courts-martial of any kind, but was without any legal means of enforcing discipline on its ships. See Sen. Rep. 958 and H.R. Rep. 2749, both 59th Cong., 1st sess.

We say, therefore, that any blue-water precedents must be used with extreme care.

Having drawn attention to some basic distinctions that must be made in the evaluation of the historical materials, we now proceed to set forth all of the historical evidence bearing on the present issue that we have found.

B. *The only known English ruling from the XVIII Century held that there was no military jurisdiction over accompanying civilians in time of peace.*

In the course of his famous judgment in *Mostyn* v. *Fabrigas*, 1 Cowp. 161 (1774), Lord Mansfield, C.J., said (pp. 175-176):

> "I remember, early in my time, being counsel in an action brought by a carpenter in the train of Artillery, against Governor Sabine, who was Governor of Gibraltar, and who had barely confirmed the sentence of a court-martial, by which the plaintiff had been tried, and sentenced to be whipped. The Governor was very ably defended, but nobody ever thought that the action

would not lie; and it having been proved at the trial, that the tradesmen who followed the train, were not liable to martial law; the Court were of that opinion, and the jury accordingly found the defendant guilty of trespass, as having had a share in the sentence; and gave 500*l* damages."

Now, very plainly, the foregoing is the recollection of a trial by a participant therein; but we submit that even the professional reminiscences of a Lord Mansfield are apt to portray far more accurately the law of his time in action than the forced inferences now sought to be drawn, nearly two centuries later, from the bare bones of the statute book (Pet. Br., No. 21, pp. 29-32). In any event, Lord Mansfield demolishes the suggestion (*id.*, p. 53) that courts-martial in Gibraltar had power to punish civilians for offenses otherwise cognizable in the civil courts.

Lord Mansfield's conclusions are moreover in accord with those set forth in Clode, *The Administration of Military and Martial Law* (2d ed. 1874) 94, 95 (quoted in the *Singleton* brief in No. 22), and show that the passage from Samuel, *Historical Account of the British Army and of the Law Military* that is quoted at Pet. Br., No. 21, pp. 31-32, plainly had reference to the wartime situation "in the field."

Reference is also made to the Act of 5 Geo. III, c. 33, likewise quoted in the *Singleton* brief, by the terms of which British military commanders in North America were directed to send civilian offenders in the wilderness to the nearest settled colony for trial. See pp. 72-74 of that brief.

The foregoing authorities establish that the assertion (Pet. Br., No. 21, p. 33) "that provision by the legislature for the trial by court-martial of persons 'in civil life'

was not repugnant to the English concept of liberty at the time of, and preceding, the American Revolution" has only the merit of hopefulness. The cited authorities show that the quoted assertion is simply not so.

C. *The many military trials of civilians by the Continental Army during the Revolutionary War do not support the peacetime military jurisdiction now asserted.*

We have listed in Appendix A the cases of 78 civilians of whose trials by court-martial we have found mention in Washington's General Orders over an eight year period, from 1775 to 1785. (We may note that the Government cited only 18.)

Part I of Appendix A lists the civilian employees so tried. Since every one of those trials took place in the Continental Army, in time of war, and "in the field," it is plain that those instances add nothing to what we have always conceded, viz., that civilians with the forces at such a time and place are subject to military law. Those examples do not, however, lend any support to the Government's attempt to erase the "in the field" limitation, in part by assertion (Pet. Br., No. 21, pp. 52-61), and in part by avoiding mention of the many official rulings which insisted on that limitation.

Part II of Appendix A lists the civilians tried by Continental Army courts-martial who were not employees of that Army. (We cite 35, as against a mere two listed by the Government.)

Some of those in the second group were spies, who as offenders against the law of war have traditionally been triable by the military regardless of their status otherwise. See *Ex parte Quirin*, 317 U.S. 1. The balance were inhabi-

tants, tried not under the Articles of War, but pursuant to a resolve of Congress that denounced aiding the enemy. In a sense, this too was a jurisdiction to punish breaches of the laws of war.

That analysis does not involve reading into an Eighteenth Century practice concepts not fully developed until the Twentieth; Washington himself pointed out the distinction in a contemporary letter written on Feb. 14, 1778 (10 *Writings of Washington* 458,459):

> "There are, however, some mistakes in the present proceedings, which it will be necessary to rectify in the next. Joseph Rhoad and Windle Myer, being inhabitants, are not triable on the Articles of War, but must be tried on a special resolution of Congress passed the 8th of October last and extended by another of December 29th, which are inclosed for the Government of the Court."

For the resolutions in question, see 9 J. Cont. Cong. 784 and 1068.

Similarly, Washington wrote Gen. Smallwood on May 19, 1778 (11 *Writings of Washington* 420):

> "In those cases, where it is a crime, if the criminal is an inhabitant, we have no law, subjecting him to the jurisdiction of a court martial, but he must be referred to the civil power, to be tried for treason. There is a resolve of Congress, empowering Courts Martial to take cognizance of inhabitants who have any communication of Trade or intelligence with the enemy, or who serve them in the capacity of guides or pilots; but the operation of this law is limited to persons taken within thirty miles of Head Quarters; which prevents its application to the present case."

Otherwise stated, this was an "in the field" jurisdiction even as to non-accompanying civilians. For, as Washington had written Governor Livingston of New Jersey on April 15, 1778 (11 *id.* 262),

> "I am not fully satisfied of the legality of trying an inhabitant of any State by Military Law, where the Civil authority of that State has made provision for the punishment of persons taking Arms with the Enemy."

And, on April 9, 1779, Washington ordered a spy to be delivered up to civil authority. 14 *id.* 357.

But, while Washington was thus sensitive to the boundary between the civil and the military jurisdiction, some at least of the trials listed in Appendix A would plainly not pass muster today; see Nos. 9, 20, and 39, where the civilian official, being described as "late" Commissary, etc., appears to have left the service. Cf. *Toth* v. *Quarles*, 350 U.S. 11.[2]

Nor is it clear how and to what extent all of the trials of inhabitants noted would fare under the tests for wartime military jurisdiction of, respectively, *Ex parte Milligan*, 4 Wall. 2; *Ex parte Quirin*, 317 U.S. 1; and *Duncan* v. *Kahanamoku*, 327 U.S. 304.

But it is not necessary to pursue that speculation. It is sufficient that none of the trials of civilians by Continental court-martial during the Revolutionary War even faintly support the jurisdiction now asserted.

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[2] In 1779 (15 *Writings of Washington* 108-109) the trial of an officer who had resigned was ordered. It does not appear whether the resignation had merely been tendered or whether it had actually been accepted; the context suggests the former.

D. *Military trials of civilians in the 1790s, at a time when there was endemic conflict between the military and civilian authorities, reflect primarily illegal assertions of military power and do not establish any authoritatively settled practice, such as the Government now urges, of exercising military jurisdiction only over civilians actually with the army in areas where there is no civil jurisdiction.**

In Appendix B, we list 40 instances of civilians or possible civilians tried by court-martial or punished by the military, between January 1793 and November 1798, a number of which are still recorded only in manuscript.

As will be pointed out immediately below, these trials can be classified in four groups, one plainly legal; two, equally plainly illegal; and only a fourth group that falls even arguably within the limits now advanced by the Government, viz., military trials of civilians accompanying the army in peacetime in an area where there is no civil jurisdiction.

Yet none of these trials appear to have been approved by higher authority, whether civil or military, and therefore, particularly since this period witnessed continuous friction between the civil authorities and the army over the scope of the latter's authority, none of these instances can be regarded as covering with a mantle of constitutional legitimacy the precisely defined military jurisdiction now sought to be sustained.

1. *The trials from 1793 to 1798 divided into categories.*

Four categories immediately suggest themselves:

(a) The first is the "in the field" jurisdiction over civilians, the trial by court-martial of a civilian with the army

* It is requested that Appendix D, *infra*, pp. 128 *et seq.*, be read before proceeding with this section.

at a time and in a place where military operations are being carried on. This jurisdiction is plainly legal; see Art. 2(10), UCMJ, and particularly the discussion at pp. 28-33 of the *Singleton* brief in No. 22.

(b) The second is military jurisdiction over civilians accompanying the forces in time of peace but at a place distant from any civil courts. This is debatable ground in the present cases; the Government contends that it is legal, we show that it was consistently condemned in numerous official rulings that the Government ignores.

(c) The third is military jurisdiction over civilians accompanying the forces in time of peace but in places where the civil courts are functioning. That jurisdiction is condemned by the Sixth Amendment, and we do not understand the Government to support its legality anywhere in the United States.

(d) The fourth category is military jurisdiction over civilians not shown to be functionally connected with the Army in any way, but simply in the vicinity. Such trials are of course palpably illegal. For this was the kind of military jurisdiction over ordinary civilian offenders that the British Parliament in 1765 and thereafter had refused to exercise, and that the Continental Congress in 1787 had refused to extend, even temporarily, over this precise area. See the details in the *Singleton* brief in No. 22 at pp. 72-74 and 90-94.

The 40 instances noted in Appendix B may be divided as follows (cases are numbered as there stated).

(a) *In the field.* In this category may be placed the two trials of sutlers at Green Ville in July 1794 (Nos. 2 and 5), at a time when the campaign that culminated in the victory at Fallen Timbers was about to start. See Jacobs, *The Beginning of the U. S. Army, 1783-1812* (1947) 168-171.

Possibly this would include also the two trials of traders unconnected with the army, Nos. 3 and 4.

(b) *Peacetime, distant from civil jurisdiction.* Most of the rest of the trials of accompanying civilians while the Army was under Wayne's command might be included here; see Nos. 6-18, 23-25, 29. However, if it be considered that the state of potential hostilities did not terminate until the signing of the Greenville treaty with the Indians on August 3, 1795, then all but No. 29 must be regarded as having taken place "in the field."

Also, since Greenville was within the boundaries of the organized Northwest Territory, it might be urged that there was an existing civil jurisdiction; one would have to determine the extent to which Greenville was then a settled community.

It should be noted that the civilian status of at least nine of the foregoing (Nos. 7-15) cannot be deemed to have been established beyond question; see *infra*, pp. 41-43.

In any event, seven other trials (and one instance of punishment without trial) involved civilians not alleged to have been connected with the army (Nos. 19-22, 26-27, 30).

(c) *Peacetime, within civil jurisdiction.* Seven of these cases are listed: No. 1, at Legionville, within the Commonwealth of Pennsylvania; Nos. 30A and 31 at West Point, N.Y.; Nos. 32, 33, and 37 at Detroit; and No. 38, at Pittsburgh.

(i) Legionville was a few miles northwest of Pittsburgh; it is now in Harmony Township, Beaver County, Pa.; see map in Wildes, *Anthony Wayne* (1941) 361. Very plainly, it was in a settled area, and indeed Gen. Wayne had, in Pittsburgh and elsewhere, sharp conflicts with the civil authorities. Wildes, 378-379.

(ii) West Point was then only within Orange County, N.Y., and had been purchased in 1790 pursuant to authority granted by the Act of July 5, 1790, c. 26, 1 Stat. 129. Not until March 2, 1826, did New York cede exclusive jurisdiction to the United States. N.Y. Laws of 1826, c. 64, p. 46; see *United States* v. *Knapp*, Fed. Case No. 15,538 (S.D. N.Y.). New York's writ ran there; see *In the matter of Carleton*, 7 Cow. 741 (N.Y. 1827). (For the present jurisdictional posture, cf. *People* v. *Hillman*, 246 N.Y. 467, 159 N.E. 400.)

(iii) Detroit in 1797 had a sheriff and a full complement of civil magistrates. See 2 Quaife, ed., *The John Astin Papers* (1931) 112-114. And Gen. Wilkinson was sued and had difficulties because he did not observe the boundary between civil and military authority. 2 *id.* 165, note 66.

(iv) *A fortiori*, Pittsburgh in 1798 (No. 38) had a settled system of civil courts.

(d) *Peacetime, over civilians unconnected with the Army.* At least 15 of the civilians tried by court-martial or otherwise punished by the military in the 1790s are not shown to have been connected with the Army in any degree. This group comprises the following: Under Gen. Wayne, two traders (Nos. 3 and 4), and seven others (Nos. 19-22, 26-28), among whom was a former soldier (No. 19). It includes Polly Toomy, flogged without trial at West Point in 1795 (No. 30A) and "Betts the Whiskey Smuggler" drummed out of camp by Gen. Wilkinson's order in 1796 (No. 30). And it includes the following tried by court-martial *tempore* Wilkinson, viz., a merchant and two civilians at Detroit (Nos. 34-36), and the Spaniard in Mississippi Territory in 1798 (No. 39).

We believe it is not possible to establish the legitimacy of this last group of trials on any basis.

2. *The foregoing trials establish, not a settled legal practice, but simply show the nature of and reason for the conflict between military officers and civil officials that characterized the American frontier in the 1790s.*

The trials here in question, far from reflecting a settled jurisdiction, affirm rather the timelessness of this Court's observation in *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524, that "Illegitimacy cannot attain legitimacy through practice."

Leonard White in his administrative history of the first three presidential terms has shown how endemic conflict between civil and military officials dogged the early years of territorial government. See "Government in the Wilderness" in *The Federalists* (1948) 366-386. Many examples document that conflict as it touched military jurisdiction over civilians.

(a) As early as August 15, 1791, Judge Symmes of the Northwest Territory was complaining that Governor St. Clair was "putting part of the town of Cincinnata under military government. Nor do the people find their subordination to martial law a very pleasant situation. * * * There are, indeed, many other acts of a despotic complexion, such as some of the officers * * * while General Harmar commanded, beating and imprisoning citizens at their pleasure." Bond, ed., *The Correspondence of John Cleves Symmes* (1929) 148-149.

Another complaint from the same source is dated January 25, 1792 (*id.* 161):

> "The superiority which the Governor affected to give the military over citizens, is maintained with ridiculous importance by some of the officers. I will give you one instance: Capt. Armstrong, commanding at Fort

> Hamilton, ordered out some settlers and] threatens to dislodge them with a party of soldiers if he is not obeyed. The citizens have applied to me for advice, and I have directed them to pay no regard to his menaces, yet I very much fear he will put his threats in execution; for I well know his imperious disposition. This same Armstrong, soon after the Governor had ordered Knowles Shaw's house burned, and himself and family banished, met with Mr. Martin, the deputy sheriff, with whom, a little before, he had some dispute touching the superiority of the civil or military authority. Armstrong now deridingly takes the sheriff by the sleeve, saying: 'What think you of the civil authority now?' "

Judge Symmes shortly received assurances that such performances would cease. Secretary of State Jefferson wrote him on June 22, 1792 to say (2 Terr. Pap. of the U.S. 401),

> "[The President] has permitted me to inform you that explicit orders are given to the Military in the North western territory to consider themselves as subordinate to the civil power on every occasion where the civil has legal authority to interfere, and this I believe may be counted on for observance."

(b) In 1792, Ensign W. H. Harrison (later the 9th President) was sued by two Army artificers for stripes inflicted by his direction under Gen. Wilkinson's order. Judge Symmes was of opinion that "the artificers of an army are subject to martial law," but that the question "an artificer, or no artificer" was for the civil courts to determine. 2 Terr. Pap. of the U.S. 400, 402.

As nearly as can be determined at this distance, there were military artificers as well as civilian artificers at this

period, so that it is not at all clear that the individuals who sued Ensign Harrison were civilians.

(i) *Military status.* In Sec. 7 of the Act of March 5, 1792, c. 9, 1 Stat. 241, 242, there is a reference to "artificers included as privates." Similarly, in Sec. 3 of the Act of May 9, 1794, c. 24, 1 Stat. 366, provision is made for "ten artificers to serve as privates." In later military legislation, through at least 1802, artificers constantly appear as military individuals. See also the references to artificers in the Orderly Books of General Wayne and of the Corps of Artillerists and Engineers, quoted *supra*, p. 28.

Similarly, with respect to a category closely allied to the artificer, the Wayne Orderly Book for March 27, 1795 (34 Mich. Pion. & Hist. Coll. 593) records the following trial, announced from Head Quarters Green Ville:

> "At a General Court Martial whereof Major Buell is President, William Crocker, an Armourer in the Service of the United States, and James Scott a Fifer in the 4th Sub Legion, were tried upon the charges respectively exhibited against them, found Guilty, and ordered to receive One hundred lashes each, but recommended by the Court to Mercy—
>
> "The Commander in Chief Pardons them Accordingly, and Orders them to be immediately liberated and to join the companies to which they belong—"

Here, it would seem, the armourer was a soldier. Compare the entry quoted *supra*, p. 28, where the Master Armourer is referred to as a warrant officer.

(ii) *Civilian status.* The early entry in 1 *Orderly Book of the Corps of Artillerists and Engineers* 8, quoted *supra*, p. 28, lists artificers as military members of the garrison. A later order in the same year (1 *id.* 151) speaks of "No

Artificer not belonging to the Regiment * * *." Such persons, it is fair to assume, were civilians.

(iii) *Questionable status.* In the 1776-1786 Articles of War in force during the period in question, Art. 23 of Sec. XIII was the provision regarding accompanying civilians, while Art. 5 of Sec. XVIII was the general article.[3] The latter referred only to "officers and soldiers," while the civilian provision was by its terms applicable to certain classes of civilians "though no inlisted soldier."

If the court-martial order, therefore, mentions Art. 23 of Sec. XIII, with or without a further mention of Art. 5, Sec. XVIII, it is fair to assume that the accused is "no inlisted soldier," unless of course his description, as, e.g., a sutler, plainly shows him to be a civilian. Contrariwise, failure to refer to Art. 23 of Sec. XIII may be taken in equivocal cases to reflect a military rather than a civilian status on the part of the person on trial.

On that footing the individuals tried in cases 7-15 inclusive may well not have been civilians, a view confirmed by the fact that William Crocker, Armourer, No. 10, appears to be the same individual who in the entry for March 27, 1795, quoted above, p. 42, seemed clearly to be a soldier rather than a civilian.

The results of trial in all nine cases, five of the accused being designated as armourers, the other four as artificers, were announced in the same order of Jan. 31, 1795 (34 Mich. Pion. & Hist. Coll. 583-584).

The question of these nine individuals' civilian status can, therefore, only be answered with the Scotch verdict, Not proven.

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[3] Later AW 99 of 1806; AW 62 of 1874; AW 96 of 1916 through 1948; Art. 134, UCMJ.

(c) Meanwhile, at Pittsburgh, where he had arrived by July 1792, Gen. Wayne was becoming embroiled with civil authorities also. Wildes, *Anthony Wayne*, 378-379. By December, he had moved the troops to Legionville, still within the Commonwealth, and there, on December 9, 1792, he issued the following order (*Wayne Orderly Book*, MS., Hist. Soc. Pa., Phila.):

> "It having been represented to the Commander in Chief,[1] that the market has been forestalled; and high and exorbitant prices Demanded & given for a variety of Articles, far beyond any price heretofore known in this Country from the thoughtless conduct of Individuals. * * * it becomes necessary that there should be an Officer of Police to Superintend & regulate the Market; and whilst he Allows a generous price for the produce brought to this place (except whiskey; which is hereby Prohibited from being Sold, bartered or furnished the Soldiery either directly or indirectly by Merchants traders or Others) he will at the Same time protect the inhabitants from injury and insult; and Guard against exorbitancy and forestallment.—
>
> "Captain Porter will perform this Duty and make the necessary Arrangements & Regulations. * * *"

It goes without saying that, when a military commander has such a distortedly inflated view of his powers over the civilian economy in a State of the Union in time of peace, one cannot take too seriously his jurisdictional practices in respect of trying civilians by court-martial.

(d) At Detroit in July 1797, Gen. Wilkinson issued an order aimed at civilians who sold liquor to soldiers and who persuaded them to desert; *Wilkinson Order Book* (MS.,

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[1] I.e., Wayne, who normally signed himself "Major General and Commander in Chief of the Legion of the United States."

Nat. Archives) 48, quoted in full below; see page 114, note 3.

Now, very plainly, Wilkinson had no power to direct civilians in a community where magistrates and a sheriff were functioning to do anything; his authority was limited to his own troops. Moreover, enticing a soldier to desert had been made a civil offense by Congress in the preceding year, see Sec. 15 of the Act of May 30, 1796, c. 39, 1 Stat. 483, 485, and punishable with a maximum penalty of a $300 fine *or* one year's imprisonment. Yet Wilkinson approved, for precisely the same offense, a particularly vicious sentence passed on a civilian inhabitant by a court-martial, that condemned him, among other indignities, to shaving of the head and eyebrows and fifty lashes with a wired cat-of-nine-tails (No. 35).

Obviously, then, his three trials of citizens at Detroit (Nos. 34-36) were palpably illegal on any basis; while those of the sutlers (Nos. 32, 37) and of the woman of the camp (No. 33), there being civil authority present, were likewise unlawful although perhaps less strikingly so.

Notice has already been taken of the conflict evoked by this assertion of power, *supra*, p. 39; and in 1799 the commanding officer at Detroit had again to be reminded by higher authority of "the error * * * in proclaiming military law, and threatening the inhabitants with punishment by court-martial." 3 Terr. Pap. of the U.S. 20-21.

Wilkinson's trial of a follower at Pittsburgh in 1798 (No. 38) stands on no better footing.

His last recorded trial of a civilian, a Spanish subject, took place in November 1798 at Loftus's Heights, Mississippi Territory (No. 39), now Fort Adams, Wilkinson Co., Miss., in the southwestern part of that state.

By that time the Mississippi Territory had been organized (Act of April 7, 1798, c. 28, 1 Stat. 549), and Winthrop Sargent had been commissioned Governor (5 Terr. Pap. of the U.S. 28-29) and had arrived in Natchez (*id.* 52, note 5). It may well be that no courts were yet functioning. But there is reason to believe that the accused was tried and his punishment remitted primarily that Wilkinson might show the remission to the Spanish Governor at New Orleans and thus curry favor with his paymaster. Jacobs, *Tarnished Warrior: Major-General James Wilkinson* (1938) 183 (transmission of order to Gayoso), 271-273 (proof in Spanish Archives of payments to Wilkinson).

(c) Little more can be said for the trial of the sutler at West Point in 1795 (No. 31).

Major Touſard, Commandant of the Garrison, the same who two months earlier had ordered Polly Toomy flogged without trial (No. 30A), on Sept. 26, 1795 issued a Standing Order (1 *Orderly Book of the Corps of Artillerists and Engineers* (MS, U.S.M.A.) 151):

> "To all whom it may Concern
>
> "Be it know, that deffense is expressly made to sell any Liquor to the Soldiers composing this Garrison * * *"

This was followed by the text of Sec. XIII, Art. 23, of the 1776 Articles of War, then still in force.

It can hardly be supposed that an officer who after nearly twenty years had been unable to absorb idiomatic English would be aware of the Anglo-American tradition of civilian supremacy or of the constitutional distinctions flowing from the circumstance that his post was within a State of the Union at a time and place of piping peace.[3]

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[3] Major John Joseph Ulrich Rivardi, who approved the proceedings, was likewise a Frenchman by birth, whose first commission in

3. *The circumstances of these trials are not such as to establish their legitimacy.*

Wayne had been a surveyor and a tanner before he became a soldier (19 Dict. Am. Biog. 563), Wilkinson a doctor (Jacobs, *Tarnished Warrior* 3-7), Tousard had been a soldier when he came to America in 1777 as a volunteer (1 Heitman 966), and St. Clair had written Washington in 1789 (2 Terr. Pap. of the U.S. 204, 207), "The present Governor pretends not to a knowledge of the Law—" The sum total of these trials, therefore, does not add up to a consensus of lawyers' opinion as to the constitutional boundaries of military power.

Even contemporaries questioned the legality of some of the proceedings. Wilkinson himself wrote the Secretary of War on March 14, 1797 in these terms (*Memoirs of General Wilkinson*, 1810 ed., App. to vol. I, 173-174):[6]

> "I consider it my duty, in this place, to urge the appointment of a judge advocate, and to recommend lieutenant Smith to the office, as the individual of the army, best qualified for the station. After the ignorance, misrule and lawless proceedings, which I have witnessed in our military tribunals, I should be criminal were I silent on this occasion. In a community, where men are so frequently put upon trial for life and honor, and where we very often find their judges young men, strangers to every rule of practice in judiciary proceedings, and profoundly ignorant in all things: surely, every possible precaution should be

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the United States Army dated from Feb. 26, 1795—little more than eight months previously. 1 Heitman 833.

[6] This is a wholly different work from the 1816 edition published as *Memoirs of My Own Times*. The earlier work was never completed, and the volumes actually published are in the Rare Book Division of the Library of Congress.

> interposed, to promote the lights of information and to preclude error; for, to the reproach of humanity, our military records bear testimony to several unjust sentences, and to one illegal execution of a private soldier. * * *"

The appointment of a judge advocate had been authorized by Sec. 2 of the Act of March 3, 1797, c. 16, 1 Stat. 597, but Campbell Smith, by then a Captain, appears not to have been appointed to the office by the President until 1801. *Wilkinson Order Book* 321 (Apr. 9, 1801); 1 Heitman 894-895 (appointment as judge advocate, Apr. 1, 1801).

Yet—and here is a curious point—Lt. Campbell Smith's appointment as "Judge Martial and Advocate General to the Legion of the United States" is duly noted in the Wayne Orderly Book for July 16, 1794 (34 Mich. Pion. & Hist. Coll. 529), and he was able to persuade the Congress to allow him extra pay on the footing of the earlier appointment. 1 Am. St. Pap. Mil. Aff. 144-146; Act of March 29, 1800, c. 17, 6 Stat. 40.

It is true that some of the earliest court-martial proceedings still extant reflect patent irregularities. Thus, although AW 6 of 1786 clearly made provision for a judge

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See also the orders of Sept. 8 and 23, 1792, at Pittsburgh, appointing Lieut. Staats Morris "Deputy Judge Advocate General to the Legion of the United States," and directing that he "will always officiate as Judge Advocate at General Courts Martial." 34 Mich. Pion. & Hist. Coll. 379 and 385.

All War Department papers prior to 1801 were destroyed in a fire on the night of Nov. 8, 1800 (1 Am. St. Pap. Misc. 232, 603). Earlier court-martial orders appear in the order books of Gens. Wayne and Wilkinson and of the Corps of Artillerists, etc., at West Point. The only complete proceedings that record the testimony prior to 1808 of which we are aware are in the Wayne MSS., Hist. Soc. Pa., Phila. The series in the National Archives (*Proceedings of Courts-Martial, War Office*) contain nothing earlier than 1808.

advocate, the West Point *Orderly Books of the Corps of Artillerists and Engineers* contain proceedings in which there was no judge advocate but only a "Recorder" (1 *id.* 93) or a "Judge Recorder" (2 *id.* 112), or where a cadet was "Acting Judge Advocate" (4 *id.*, Nov. 10, 1798).

And, whether or not Campbell Smith was Judge Martial to the Legion in the sense of being a legal adviser to its Commander, his ability to influence the imperious temper of Anthony Wayne may well be doubted. That officer's court-martial orders reflect, even by the standards of that day, a broad streak of consistent brutality.

Soldiers were frequently sentenced to be branded on the forehead (34 Mich. Pion. & Hist. Coll. 371, 381, 484), a practice at which the Secretary of War frowned and which the President questioned. See letters Wayne to Knox, Aug. 10 and Sept. 7, 1792, in 1 *Campaign Into the Wilderness: The Wayne-Knox-Pickering-McHenry Correspondence* (Knopf ed. 1955) 52, 81; Knox to Wayne, Sept. 14, 1792, 1 *id.* at 90; Washington to Sec. War., Aug. 26, 1792, 32 *Writings of Washington* 134, 135.[9]

Some of Wayne's sentiments simply mirrored the era. Thus, in confirming a death sentence for mutiny—later reprieved—he wrote on August 3, 1792, "A soldier who lifts his arm against his officer ought not to be permitted to live." 34 Mich. Pion. & Hist. Coll. 356. But on other occasions his confirmations in capital cases appear to exhibit an almost personal satisfaction:

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[9] One of the most savage of such sentences was passed on a soldier convicted of stealing from the tent of Wayne's aide-de-camp: "to walk the Gantlett, through the Legion of the United States (slow step) Naked.—to have his head and eye brows shaved, to be branded on his forehead, and in the palms of both hands with the letter T and to be drummed out of Camp with a halter around his neck and dismissed the Service." *Wayne Orderly Book*, Head Quarters Legion Ville, Feb. 17, 1793 (MS., Hist. Soc. Pa., Phila.).

"The Reverend Doctor Jones will attend and prepare these unhappy Men, for the great change they are shortly to experience." Nov. 27, 1794, 34 *id.* 571.

"The Reverend Doctor Jones, will attend at the Provost, and prepare the Minds of these unfortunate Men, * * * for the awful Moment of their exit from this transitory World." July 2, 1795, 34 *id.* 624 (later pardoned on Aug. 29, *id.* 640).

A similar harshness had attended Gen. Wayne's suppression of the mutiny in the Pennsylvania Line in 1783. Wildes, *Anthony Wayne*, 242-245.[10]

4. *None of the foregoing trials were ever approved by higher civil authority, but were contrary to policies formulated by civil authority.*

There is no indication whatever that any of the military trials of civilians discussed above were ever approved by, much less submitted to, higher civil authority. If they had been, then we would at least be vouchsafed an authoritative contemporaneous interpretation of military law.

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[10] In Wildes, 378, it is said, "When Ensign William T. Payne was caught weeping at the sight of a deserter's being executed [Sgt. Trotter, per order of Nov. 11, 1792, at Pittsburgh]; the boy was charged with drunkenness and was forced out of the army." But the actual proceedings (49 Wayne MSS., Nos. 51-54, Hist. Soc. Pa.) hardly support this stricture. The accused in his defense said, "my mind affected with melancholy reflection on human fatality (although at the same time I approved both the sentence and the execution) this might account for my shedding tears without being supposed intoxicated." There was considerable testimony that Payne was drunk. And certainly no degree of melancholy would account for his falling over the late deserter's corpse, a fact that was established by the evidence. The accusation therefore cannot be regarded as a concocted subterfuge.

The court sentenced Payne to dismissal, with a recommendation for clemency "so far as to receive his resignation without publishing his disgrace"; and Gen. Wayne permitted him to resign accordingly, by order of Nov. 17, 1792. 34 Mich. Pion. & Hist. Coll. 405.

such as exists in the approval by President Madison of Gen. William Hull's trial by court-martial in 1814 where the accused was denied the assistance of counsel despite his invocation of the Sixth Amendment. See references collected in 72 Harv. L. Rev. 29-31, and commentary, *id.* 42-49.

Certainly Washington's letter to the Secretary of War in September 1792, referring to neglects on the road between Philadelphia and Pittsburgh within the Commonwealth of Pennsylvania, cannot be construed as a direction to try the offenders by court-martial.[11]

The fact is that, in the area now being considered, every expression from higher authority points to a disapproval of the exercises of military jurisdiction that have just been reviewed at such length. Here are two letters from President Washington, written at the time of the Whiskey Rebellion; the first is to Governor Lee of Virginia, then in command of the militia, dated Oct. 20, 1794. Washington wrote (34 *Writings* 6):

> "There is but one point on which I think it proper to add a special recommendation. It is this, that every officer and soldier will constantly bear in mind that he comes to support the laws and that it would be peculiarly unbecoming in him to be in any way the infractor of them; that the essential principles of a free government confine the provinces of the Military to these two objects: 1st: to combat and subdue all who may be found in arms in opposition to the National will and authority: 2dly to aid and support the civil Magistrate in bringing offenders to justice.

[11] "The conduct of the Waggoners, in dropping the public stores with the transportation of which they are charged, along the Road to Pittsburgh, ought to undergo the strictest scrutiny; and in cases of culpability, to meet with severe punishment by way of example to others." 32 *Writings of Washington* 139.

> The dispensation of this justice belongs to the civil Magistrate and let it ever be our pride and our glory to leave the sacred deposit there unviolated . . ."

The President restated the same views to Gen. Morgan on March 27, 1795 (34 *Writings* 159-160):

> "Still it may be proper constantly and strongly to impress upon the Army that they are mere agents of Civil power: that out of Camp, they have no other authority, than other citizens [,] that offences against the laws are to be examined, not by a military officer, but by a Magistrate; that they are not exempt from arrests and indictments for violations of the law; that officers ought to be careful, not to give orders, which may lead the agents into infractions of the law; that no compulsion be used towards the inhabitants in the traffic, carried on between them and by the army: that disputes be avoided, as much as possible, and be adjusted as quickly as may be, without urging them to an extreme: and that the whole country is not to be considered as within the limits of the camp."

That is to say, while the armed force of the Nation was actually arrayed against the insurrectionists in Western Pennsylvania, Washington was denouncing the very excesses that Wayne had committed in substantially the same area a few years earlier, at a time when all was peaceful.

It should also be noted that there is no evidence whatever that the trials now under consideration ever came to the attention of the Congress.

Indeed, there is ample evidence on the statute book that Congress during this period was somewhat less than eager to face up to the problem of conforming the Continental Articles of War to the new Constitution.

General Knox, last Secretary at War under the Confederation and first Secretary of War thereafter, immediately recognized in August 1789 "that the change in the Government of the United States will require that the articles of war be revised and adapted to the constitution" (1 Am. St. Pap. Mil. Aff. 6). Washington transmitted his recommendations for a small peacetime Army to the Senate, remarking "that the establishment thereof should in all respects, be conformed by law, to the Constitution of the United States" (30 *Writings of Washington* 376). But Congress for many years was quite unwilling to undertake the necessary labor of revising, adapting, and conforming.

On no less than three occasions in the 1790's, Congress simply reenacted the Continental Articles of War with a generalized qualification, "as far as the same may be applicable to the constitution of the United States" (Sec. 13 of the Act of Apr. 30, 1790, c. 10, 1 Stat. 119, 121; Sec. 14 of the Act of Mar. 3, 1795, c. 44, 1 Stat. 430, 432; Sec. 20 of the Act of May 30, 1796, c. 39, 1 Stat. 483, 486). On a fourth occasion, the Continental Articles for the Government of the Navy were similarly reenacted (Sec. 8 of the Act of July 1, 1797, c. 7, 1 Stat. 523, 525). Here was a blanket proviso, telling the reader everything—and nothing—except, inferentially, that Congress was more than prepared to postpone to a future day the expression of constitutional opinions in this area.

And it is a fact that the revision of the Articles of War that Secretary Knox had indicated to be necessary in 1789 was not in fact effectuated until 1806, and then only after many delays. See, for the legislative history, 72 Harv. L. Rev. at 15-22.

Accordingly, the legislative materials fail to show acquiescence in, much less ratification of, the military trials of civilians that we show took place in the 1790's.

5. *The foregoing trials are not a safe guide to constitutional interpretation, and therefore do not support the military jurisdiction now asserted.*

Even at the risk of repetition, we deem it proper to point out that of the foregoing trials, those at West Point, at Pittsburgh, and at Detroit were palpably, indeed flagrantly, illegal, since the civil courts were open and functioning.

Some of the wilderness trials were very obviously in the field; the others may present borderline cases. But it must always be borne in mind that Major General Anthony Wayne, doughty Indian fighter that he was, is not to be regarded as a constitutionalist.

The Republic must ever be grateful to him for (literally) whipping the Legion into such form that it could win the smashing triumph over the Indians at Fallen Timbers that made the Old North West actually and not merely nominally American.

There is no occasion now to consider whether or not great fighters are also great men. It is sufficient here merely to observe that it would be badly misreading the troubled time of the 1790's to suggest that Anthony Wayne's actions can furnish guidance in settling the boundaries of military power. He did so much that was obviously illegal that the simple fact of his having acted as he did—the mere historical precedent—cannot possibly serve as a constitutional precedent, least of all since what he did ran counter to the views expressed by the President in the same area, and was never shown to have been brought to the attention of, much less approved by, the Congress.

Moreover, as we point out in Appendix D, pp. 128 *et seq.*, *infra*, in the context of concepts then prevailing, these trials appear to have been regarded as having taken place in time of war.

E. *The peacetime military jurisdiction exercised over civilians from 1825 to 1860 was episodic in the extreme and similarly reflected illegality rather than authoritative constitutional interpretation.*

The last trial of a civilian recorded in General Wilkinson's Order Book was on November 19, 1798 (No. 39): the last entry in that collection is dated April 23, 1808; the War Department series of recorded military trials (*Proceedings of Courts-Martial, War Office*, MSS., Nat. Arch.) begins then; but neither party has found any military trials of civilians between 1798 and 1827.

For the sake of completeness, two intervening items should be noticed.

(i) Isaac Maltby, a Brigadier General in the Massachusetts Militia but probably no lawyer,[12] published in 1813 *A Treatise on Courts Martial and Military Law*. At p. 31 of that work, citing only AW 60 of 1806, he says:

> "In the regular army, all the individuals of which it is composed, whether officers or soldiers, are amenable to courts martial; also all persons attached to the army, and all persons serving with, or doing business for the army."

Literally, of course, this would include dependents on a post in a settled area of the United States as well as contractors with the army; as a correct statement of constitutional law, therefore, the expression cannot be taken too seriously.

(ii) In the *General Regulations for the Army* of 1825, revised by General Scott, Article 341, dealing with sutlers, states:

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[12] The only reference we have found concerning him shows only that he was a graduate of Yale College. Wells and Wells, *A History of Hatfield, Massachusetts* (1910) 254.

"341. Every sutler shall hold his appointment during the pleasure of the Secretary of War; but besides his amenability under the 60th article of war, he may be suspended from the privilege of suttling by the commander of the post, on the recommendation of the council of administration, till the orders of the Secretary of War be received in the case."

Here again, AW 60 of 1806 was read broadly, which may account for the seven trials cited by the Government (Pet. Br., No. 21, p. 56, note 37).

1. *William Armistead,* Sutler at Fortress Monroe (No. C 68, MS., Nat. Arch.), April 1825.

The accused was charged with (1) Mutiny and Violation of Duty and (2) Conduct subversive of good order and discipline, in detaining two Negroes bringing shoes into the post by order of the Chief Engineer. A plea to the jurisdiction was rejected, after which the trial resulted in Armistead being "honorably acquitted."

2. *Jabez Burchard,* Sutler at Fort Washington, Md. (No. V 15, MS., Nat. Arch.), December 1825.

A plea to the jurisdiction was overruled on the authority of Art. 341, Gen. Regs. of 1825 (*supra*).

The accuser, Lt. Childs, was a member of the court, but a challenge on that basis was overruled, and this officer duly testified for the prosecution, the charge being that the accused sent him "a highly disrespectful note." [13]

Burchard was found guilty and sentenced to be dismissed as a sutler, the court recommending reinstatement "in consideration of his former correct deportment."

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[13] Under AW 4 of 1916 through 1948 and under Art. 25(d)(2), UCMJ, an officer who is the accuser or a witness for the prosecution is not eligible to be a member of the court.

3. *William O. West*, Sutler to Cos. E & K, 7th Inf., tried by regimental court-martial at Fort Gibson (No. BB 149, MS., Nat. Arch.), August 1833. Fort Gibson was in Indian Territory (2 Heitman 502); it is now the site of the city of the same name in Muskogee Co., Oklahoma.

The court was appointed by Col. Arbuckle, who was a witness for the prosecution, and therefore an accuser. (Had this been a general rather than a regimental court-martial, it could not, in view of the Act of May 29, 1830, c. 13, 4 Stat. 417, have been appointed by an accuser.)

West was charged with six specifications of disobedience of orders, *viz.*, selling whiskey to the troops, and found guilty on five; he was sentenced to be suspended from suttling until the pleasure of the "Secretary at War" be known. The court recommended the dismissal of one Flowers, the accused's partner, from further suttling, "as an unfit person to be about the garrison." The court also recommended "the dismissal from the Post, and its neighborhood" of three named "Laundresses of the 7th Infantry, it being the opinion of the Court, that they testified falsely, before it."

Col. Arbuckle, the convening authority, approved so much of the sentence as suspended the accused from suttling and directed the closing of his store, and ordered that portion carried into execution. He then added:

> "The remainder of the sentence is disapproved of, as it is regarded as the exclusive duty of those authorized to constitute Courts Martials, to act definitely on their proceedings.
>
> "The recommendations of the Court in relation to B. W. Flowers and others who were not on trial, however censurable their Conduct may have appeared by the testimony before the Court in the Case of W. O. West; it is unprecedented, and was a total

departure by the Court from its duties, and it is therefore disapproved, and regarded highly exceptionable."

4. *J. W. Wiese,* "a follower of the Army (Clerk to Dellam & Hambaugh, Army Sutlers)," tried at Fort Brooke, East Florida (No. CC 488, MS., Nat. Arch.), Sept. 1838. Fort Brooke was at the site of the present city of Tampa, Florida.

Wiese was charged with violation of general orders and the order of the Quartermaster's Dept., *viz.,* 4 specifications of selling liquor to teamsters in the employ of the Quartermaster at Fort Brooke.

"The Court are of opinion that it has jurisdiction over the Case, but in consequence of the Prisoner being only a Clerk to the Sutler and not the responsible person, decide to proceed no further in the prosecution against him."

In Order No. 58, Hq. Army of the South, Fort Brooke, Sept. 17, 1838, Brig. Gen. Z. Taylor commanding (MS., Nat. Arch.), which announces the results of other cases tried by the same court, there is no mention of this case.

Whether Fort Brooke was "in the field" in the setting of the then subsisting Seminole War (cf. Upton, *The Military Policy of the United States* (1917 ed.) 185-186), whether the courts of the Territory of Florida established pursuant to the Act of March 30, 1822, c. 13, 3 Stat. 654 (cf. *American Insurance Co.* v. *Canter,* 1 Pet. 511) were actually functioning in that area, need not be determined.

All of the four trials of sutlers just enumerated took place when there were no lawyers whatever in the Army: The judge advocates provided for in Sec. 2 of the Act of April 14, 1818, c. 61, 3 Stat. 426, were dropped in the

reorganization effected by the Act of March 2, 1821, c. 13, 3 Stat. 615, and the office of Judge Advocate of the Army was not again established for 28 years more, by Sec. 4 of the Act of March 2, 1849, c. 83, 9 Stat. 351.

As is pointed out below, pp. 66-70, when the question of military jurisdiction over the post trader, successor to the sutler, was thereafter presented for a legal opinion, The Judge Advocate General held that such persons were not subject to court-martial except in the field in time of actual hostilities.

And, unless it is now contended that a similar jurisdiction may constitutionally be exercised over civilians at Fort Monroe, Virginia, or at Fort George G. Meade, Maryland, the first two instances cited show only that subordinate military commanders on occasion acted illegally. Indeed, all of these cases are curiosities rather than constitutional precedents.

It remains to consider the three trials of accompanying civilians in 1858 cited by the Government.

5. *James Trader*, "a citizen in the Quarter-Master's employ" (No. HH 882, MS., Nat. Arch.), tried at Camp Scott, Utah Terr., in February 1858.

The charge was conduct prejudicial to good order and military discipline, the specification stealing a pistol from the Ordnance Department.

Finding, Guilty; sentence, 6 months' confinement at hard labor, "wearing a ball and chain attached to his leg weighing twenty-five pounds."

The sentence was approved by the Department Commander, Col. Albert Sidney Johnston, and after three weeks the unexecuted portion thereof was remitted.

6. *William C. Barnard,* "an employee in the Quartermaster's Department" (No. HH 895, MS., Nat. Arch.), tried at Camp Scott, Utah Terr., in March 1858.

Same charge as the preceding, but the specification was that the accused stole a bar of steel from the Government blacksmith shop and sold it to a civilian storekeeper's clerk. Found guilty and sentenced to 20 days' confinement at hard labor; the unexecuted portion of the sentence was remitted after 16 days.

7. *Henry F. Ringsmer,* "a Retainer in the Army of the United States in the Field" (No. HH 880, MS., Nat. Arch.), tried at Camp Scott, Utah Terr.

Same charge; specification, larceny at Fort Bridger in January 1858 of brandy belonging to the Hospital Department, and possession of such stolen brandy.

Ringsmer had counsel, who objected to the jurisdiction: the judge advocate cited AW 60 and AW 99 of 1806; plea overruled; one member however objected, and put this proposition (p. 5):

> "The Court entertain no doubt of their Competency as a judicial tribunal for the trial of the case of Mr. Ringsmer, yet as adjudication by a civil tribunal is within reach, they recommend that the prayer of the accused be granted, and that his case be referred for trial to the District Court of Green River County of the Territory of Utah at its next term."

On the next day, that proposition was withdrawn, and the objecting member submitted the following (p. 6):

> "The court recommend that the prayer of the prisoner be granted, and that the case of Mr. Ringsmer be referred for trial to the civil tribunal of Green River County of the Territory of Utah."

This failed, and the jurisdiction was sustained.

The court-martial, however, refused to permit the judge advocate either to impeach a prosecution witness by proof of his prior inconsistent statements, or to cross-examine a hostile prosecution witness, with the result that the accused was acquitted. The findings of not guilty were approved on Feb. 10, 1858.

Thus, in respect of these three cases, the argument in favor of the presently asserted jurisdiction is impaled on a dilemma:

Either the trials took place "in the field" in the context of the Mormon Campaign—see Rep. Sec. War, 1858 (Sen. Ex. Doc. 1, part 2, 35th Cong., 2d sess.), pp. 6-8, 28-223 or else civilians were tried by court-martial in an area where the civil courts were shown to be in operation. In fact, Utah had been an organized territory since 1850, with a full complement of courts. Sec. 9 of the Act of Sept. 9, 1850, c. 51, 9 Stat. 453, 455.

On neither possibility do the cases sustain the jurisdiction now asserted (Pet. Br., No. 21, p. 56), *viz.*, at "an organized camp in a remote place, where the civil law of the United States was not functioning or could be reached only with difficulty."

We may appropriately close the present heading with the 1859 enactment that purportedly subjected to the Articles of War, "in the same manner as soldiers in the Army," "all persons admitted into the Soldiers' Home." Sec. 7 of the Act of Mar. 3, 1859, c. 83, 11 Stat. 431, 434. This was carried into the Revised Statutes as 4824, into the Code as 24 U.S.C. 54, and reenacted as AW 2(f) of 1916 through 1948.

It was, of course, a jurisdiction patently unconstitutional as no one is eligible for entrance into the Soldiers' Home

until after his—now also her—discharge from the service; and so The Judge Advocate General of the Army consistently held (Dig. Op. JAG, 1912, p. 1010, ¶1A).

F. *Extensions of military jurisdiction during the Civil War must be regarded with caution.*

Much that was done in the Civil War reflects only *inter arma silent leges* and cannot be seriously accepted as a guide to contemporaneous constitutional interpretation a warning that must constantly be borne in mind in considering the arguments now advanced in favor of the presently contested military jurisdiction.

(a) It is said (Pet. Br., No. 21, p. 47) that "the constitutional term 'land and naval Forces' was not synonymous with 'armed forces' or 'armed services,'" citing Cong. Globe, 37th Cong., 3d sess., pp. 995, *et seq.*

But this overlooks that the 37th Congress is a particularly unreliable guide to the proper scope of Clause 14.

It was the 37th Congress that purported to make contractors subject to trial by court-martial (Sec. 16 of the Act of July 17, 1862, c. 200, 12 Stat. 594, 596), an asserted jurisdiction promptly—and necessarily—held unconstitutional. *Ex parte Henderson*, Fed. Case No. 6349 (C.C.D. Ky.).

It was similarly the 37th Congress that purported to make persons separated from the armed forces subject to trial by court-martial for frauds against the Government, notwithstanding their return to civilian status. Sec. 2 of the Act of Mar. 2, 1863, c. 67, 12 Stat. 696, 697, later AW 60 of 1874; AW 94 of 1916 through 1948; Art. 3(a), UCMJ. The unconstitutionality of such a recapture provision was consistently asserted by Winthrop (*142-*146), and has now been established by *Toth* v. *Quarles*, 350 U.S. 11.

The 37th Congress had therefore better be politely ignored in the present connection.

(b) Reference is made to an opinion of Judge Advocate General Holt (Pet. Br., No. 21, pp. 56-57) rendered on Nov. 15, 1866, that does not mention the "in the field" limitation.

This "opinion" is primarily remarkable because it does not even mention the Constitution, nor does it contain the slightest suggestion that the trial of civilians by court-martial in time of peace involves a constitutional question, viz., the scope of Art. I, Sec. 8, Clause 14 on the one hand (with or without Clause 18), and the reach of the Sixth Amendment on the other.

Moreover, the Holt memorandum was written a month before the opinions in *Ex parte Milligan*, 4 Wall. 2; see 18 L. Ed. 291 for their date. Therefore, since General Holt was the primary exponent of the policy of military control, through military trials, of political prisoners, see 9 Dict. Amer. Biog. 181, 182-183, his views as to the proper location of the boundary between the civil and the military jurisdiction hardly furnish safe guides today.

Holt was also the prosecutor at the Trial of the Lincoln Conspirators. That performance, although sought to be legally justified (11 Op. Atty. Gen. 215 [one sentence opinion]; 11 Op. Atty. Gen. 297), was bitterly assailed by competent contemporary critics as utterly illegal and completely unconstitutional. Beale, ed., *The Diary of Edward Bates* [Atty. Gen. in first Lincoln Administration] (H.R. Doc. 818, 71st Cong., 3d sess., vol. IV), pp. 481, 483, 498-503. No one since has ever even attempted to sustain that incarnation of anguished passion. Winthrop cites it a few times to illustrate incidental procedural points, but his silence as to its substance is deafening.

It may be noted that one's current impression of the illegality of those proceedings is notably enhanced by the circumstance that, when one of the conspirators obtained a writ of habeas corpus, the Government responded with an Executive Order that suspended the privilege of the writ. Pitman, *The Assassination of President Lincoln and the Trial of the Conspirators*, 250.

(c) In the Confederacy the courts took a narrow view of military jurisdiction. Thus, in 1864, one McKee was tried by court-martial at Alexandria, Louisiana, on charges of holding correspondence with and giving intelligence to the enemy, and of encouraging desertion, on the footing that he was a major and assistant quartermaster, C.S.A. The court-martial found that he had never been formally commissioned, amended the charge sheet to describe him as a person "under control of the military authorities governing said Quartermaster Department of the Confederate States in the Field west of the Mississippi River," found him guilty, and sentenced him to be shot.

Thus McKee was a civilian within the "in the field" limitation. None the less, the Confederate District Court for Louisiana, on habeas corpus, ordered him released. See Robinson, *Justice in Grey* (1941) 199-201, 152-153.

(d) This would be a convenient juncture to mention the enactment that in 1866 purported to subject the inmates of the National Asylum (later called Home) for Disabled Volunteer Soldiers to military law. Sec. 9 of the Act of Mar. 21, 1866, c. 21, 14 Stat. 10, 11. This provision, likewise, was carried into the Revised Statutes as §4835, into the Code as 24 U.S.C. 137, and was not repealed until 1930. Sec. 7 of the Act of July 3, 1930, c. 863, 46 Stat. 1016, 1018. Only one "trial" ever took place thereunder, a performance called by Winthrop (*123) "as absurd in fact as it was unwarranted in law"; see Dig. Op. JAG, 1895, pp. 329-330;

¶15, for the details. Of course the inmates of that institution were not in military service, see *United States* v. *Murphy*, 9 Fed. 26 (C.C.S.D. Ohio), and even in Gen. Holt's time the provision was held unconstitutional. Dig. Op. JAG, 1912, p. 1012, ¶11 (first ruling dated 1870).

G. *Present-day boundaries are fixed, not by the sporadic excesses of the past, but by the considered rulings of the Government's law officers which condemned those excesses as illegal and unconstitutional.*

After the Civil War, when the passions aroused by that conflict had subsided, and after Judge Advocate General Holt's retirement in 1875,[11] the principles of court-martial jurisdiction over civilians were reexamined.

At that time, the classic limitation of that jurisdiction to a time of hostilities and a place "in the field" were forcefully asserted by Judge Advocate General Dunn, and adopted by Attorney General Devens in 16 Op. Atty. Gen. 13 and 16 Op. Atty. Gen. 48.

It is those principles that are so strongly and convincingly set forth in Winthrop *131-*138, *142-*146.

In view of the circumstances that these rulings are now sought to be minimized (Pet. Br., No. 21, pp. 59-60), and that in 1957 they were dismissed as "indicating that at that time there was no well-established rule as to what civilians were subject to court-martial jurisdiction in time of peace" (Reply Br. for Appellant and Petitioner on Rehearing, Nos. 701 and 713, Oct. T. 1955), we have set forth in Appendix C the full text of General Dunn's opinions.

We note in passing that it might with equal logic be contended that, until *Toth* v. *Quarles*, 350 U.S. 11, and *Reid*

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[11] After his death in 1894, litigation over his will led to the celebrated case of *Throckmorton* v. *Holt*, 180 U.S. 552. See Wigmore, *The Principles of Judicial Proof* (1913) 897-989.

v. *Covert*, 354 U.S. 1, there was similarly no well established rule on the same subject.

II. *The fact that after three and a half years the Government still accords silent treatment to The Judge Advocate General's post trader ruling is eloquent evidence of the importance of that ruling in the present connection.*

A well-nigh conclusive answer to the argument that all civilians accompanying the forces were traditionally subject to court-martial jurisdiction, but particularly those civilians who were closely connected functionally with the operations of the Army, is found in the ruling on the amenability of the now all but forgotten post trader.

Post traders were in existence for about a generation, after the sutler was legislated out of existence effective July 1, 1867—by Sec. 25 of the Act of July 28, 1866, c. 299, 14 Stat. 332, 336—and before post canteens had been transformed into the now familiar post exchanges in 1892.[15]

Both by the Joint Resolution of March 30, 1867, No. 33, 15 Stat. 29, as well as by Sec. 22 of the Act of July 15, 1870, c. 294, 16 Stat. 315, 319-320 (later R.S. §1113), it was declared

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[15] Although further appointments of post traders were terminated by the Act of January 28, 1893, c. 51, 27 Stat. 426, their disappearance overlapped the emergence of the successor institutions. Post canteens had long been organized; their formal regulation, however, appears to date from G.O. 10, Hq. of the Army, 1889. By G.O. 11, Hq of the Army, 1892, it was directed that "The institution now designated as the Post Canteen will be hereafter known as the Post Exchange," and the Act of July 16, 1892, c. 195, 27 Stat. 174, 178, reflected the new designation.

Other accounts of the emergence of the post exchange (*Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483-484; *Dugan* v. *United States*, 34 C. Cls. 458; *Kenny* v. *United States*, 62 C. Cls. 328, 335n.-336n.) appear to overlook or to misread the earlier directives.

> "That such traders shall be under protection and military control as camp followers."

Moreover, by Sec. 3 of the Act of July 24, 1876, c. 226, 19 Stat. 97, 100—which according to the Attorney General (15 Op. Atty. Gen. 278, 280) did not repeal R.S. §1113, *supra*—it was further provided that every post trader

> "shall be subject in all respects to the rules and regulations for the government of the Army."

The generality of the quoted provisions differs not at all from the broad language of the contemporaneous camp-follower provision, AW 63 of 1874, which declared that

> "All persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

According to the Government's reading of the pre-1916 Articles of War (Pet. Br., No. 21, pp. 33, 52-61), it would follow that Congress had thereby subjected post traders to trial by court-martial. But The Judge Advocate General of the Army held precisely the contrary. He said, in three successive editions of his published opinions (Dig. Op. JAG, 1901, p. 563, ¶2023; *id.*, 1895, pp. 599-600, ¶4; *id.*, 1880, p. 384, ¶4):

> "A post trader is not, under the Act of 1876, and was not under that of 1867 or 1870, amenable to the jurisdiction of a military court in time of peace. The earlier statutes assimilated him to a camp-follower, but, strictly and properly, there can be no such thing as a camp follower in time of peace, and the only military jurisdiction to which a camp follower may become subject is that indicated by the 63d Article of War,

viz. one exercisable only 'in the field' or on the theatre of war. Nor can the Act of 1875, in providing that post traders shall be 'subject to the rules and regulations for the government of the army', render them amenable to trial by court martial in time of peace. * * * If * * * the Articles of War are intended to be included, the amenability imposed is simply that fixed by the particular Article applicable to civilians employed in connection with the Army, *viz.* Art. 63, which attaches this amenability only in time of war and in the field. Thus, though post traders might perhaps become liable to trial by court martial if employed on the theatre of an Indian war, as persons serving with an Army in the field in the sense of that Article, they cannot be made so liable when not thus situated * * * ."

That ruling completely undercuts the view, expressed in a number of recent judicial opinions (including some now under review here),[16] that the traditional military jurisdiction over accompanying civilians was exercised and properly exercisable at all times and in all places.

The foregoing ruling is duly noted in Winthrop's 1st edition (1886) at 131, where the author records that the post trader since 1867 has superseded the sutlers formerly authorized, and that (134, note 2) "No trial of a trader by court-martial has ever been had or ordered."[17]

[16] E.g., Judges Holtzoff and Burger in *Guagliardo*, No. 21, R. 28-31, 47-50; Judge Arraj in the present case, R. 63-69; *In re Varney's Petition*, 141 F. Supp. 190 (S.D. Calif.); *In re Yokoyama*, 170 F. Supp. 467 (S.D. Calif.).

[17] We have not been able to find the full text of the post trader ruling in the National Archives. A short abstract appears in the letter from The Judge Advocate General to the Secretary of War, Jan. 26, 1878 (39 Bureau of Mil. Justice—Letters Sent 395, MS., Nat. Arch.), where it is said that the legality of a state tax or license fee on a trader is a question for the state courts.

The post trader ruling was first cited on behalf of Mrs. Covert at the first hearing of her case, in a brief filed in April 1956. Brief for the Appellee, No. 701, Oct. T. 1955, pp. 46-47.

The circumstance that this ruling was never mentioned by the Government there, either at the original hearing or at the rehearing, and that it is nowhere mentioned by the Government at the present Term, in any of the briefs filed up to now, either in No. 21, or in No. 22, or in this case, must surely be regarded as significant.

It may show that the Government regards the post trader ruling, at least reflexly, as too important or too dangerous to notice. It may show, alternatively or additionally, that the arguments in support of the jurisdiction now in question cannot be regarded either as accurately setting forth or as accurately evaluating the state of the authorities.

No doubt the Court will be able to appraise the matter adequately without further comments on our part.

It is sufficient now to point out the tremendous change that the rulings discussed in the preceding subheading and set out in Appendix C, as well as the ruling regarding the post trader, effected in the contents of the next edition of the Digest of Opinions of The Judge Advocate General of the Army.

The 1868 edition, the last prepared under the supervision of General Holt, contained not only his rulings upholding the trials of civilians by military commission that had been condemned in *Ex parte Milligan*, 4 Wall. 2, see Dig. Op. JAG, 1868, pp. 225-232, but contained as well (p. 84) his 1866 memorandum regarding the scope of court-martial jurisdiction over civilians that is printed in Pet. Br., No. 21, pp. 56-57.

In the 1880 edition, the first under the new regime, all of the foregoing are omitted, and instead there are digested the restrictive rulings of the 1870s. Dig. Op. JAG, 1880, pp. 48-49, 211-212, 384.

It is indeed a strange evaluation that prefers the discarded rulings of a regime whose overreaching had met with such signal judicial disapprobation to those of a new set of law officers whose lodestar was a strict enforcement of the Constitution that they had sworn to support and defend.

I. *No constitutional justification was ever offered in 1916 for the extension of military jurisdiction then enacted, nor at any time thereafter.*

Under this heading, we incorporate by reference the matter at pp. 99-100 of the *Singleton* brief in No. 22.

We emphasize that, in 1916, when the by then traditional limits of military jurisdiction were expanded at General Crowder's urging, no constitutional justification for the extension was offered.

Gen. Crowder was anxious to reach cases such as that of the thieving quartermaster clerk in the 1906-1909 intervention in Cuba, who had gone unwhipped of punishment because of an amnesty proclamation. Sen. Rep. 130, 64th Cong., 1st sess., p. 38.

For the rest, his premises were notably inarticulate; significantly enough, both have since been rejected by this Court.

(1) He assumed that when the Army was overseas it was (p. 32) "away from the protection of constitutionally guaranteed rights," a proposition no longer tenable under cases subsequent to 1916: *Balzac* v. *Porto Rico*, 258 U.S. 298, 312;

United States v. *Curtiss-Wright Corp.*, 299 U.S. 304, 318; *United States* v. *Belmont*, 301 U.S. 324, 332; *United States* v. *Pink*, 315 U.S. 203, 226.

(2) He assumed (p. 70) that the test of jurisdiction was whether a case arose in the land and naval forces, viz., that the Fifth Amendment conferred military jurisdiction. *Toth* v. *Quarles*, 350 U.S. 11, 14, exploded this notion, which indeed Winthrop (*53) had never accepted for a moment. See *Singleton* brief in No. 22, pp. 101-102.

But the mystery of the 1916 Revision still remains: Why did Gen. Crowder never refer to the contrary views set forth in Winthrop, and similarly set forth in the 1912 Digest of Opinions that had just been published under his own direction?

J. *On the only occasions from 1793 to 1916 when the Attorney General and The Judge Advocate General of the Army gave reasoned consideration to the question whether trials of civilians by court-martial in time of peace contravened constitutional limitations, they answered that question with a resounding affirmative.*

The foregoing survey of the historical and administrative materials relating to military trials of civilians in time of peace shows several distinct periods.

1. In the first, from 1793 to 1798, numerous civilians were tried by court-martial. Only a limited number of those trials fall within the narrow limits for which the Government now contends. The jurisdiction then exercised represents primarily the imperious tempers of the commanders concerned, and renders understandable the conflict between civil authorities and the army that was prevalent at the time. There is no showing whatever of executive or legislative acquiesence, much less of ratification, and the only

contemporary expressions from higher authority, by President Washington himself, emphasize the subordination of the military to the civil authority. In short, the precedents of the 1790's cannot in any sense be considered as infused into the contemporary reading of the Constitution. They belong to history only insofar as history necessarily comprehends a recital of past abuses.

2. The second period, from 1825 to 1858, at a time of great military activity over a wide area by a small but highly professional force, has yielded up only seven scattered trials of civilians by court-martial in peacetime, most of which took place where the civil courts were functioning. Those instances are far too sporadic to establish a settled practice—and to the extent that they do, it is the palpably illegal practice of trying civilians by court-martial in areas served by civil courts.

3. The third period is that of the Civil War and its immediate aftermath, primarily notable in the present connection as presenting the first occasion on which the legality of military trials of civilians in peacetime appears to have been formally considered by one of the Army's law officers.

General Holt's memorandum on that occasion (Pet. Br., No. 21, pp. 56-57; Dig. Op. JAG, 1868, p. 84) does not discuss the constitutional question, and is moreover unpersuasive since it was written just before *Ex parte Milligan*, 4 Wall. 2, set the final seal of constitutional disapproval on the system of military trials of civilians that represented his unique contribution to the conduct of what in United States Government circles was then always described as the War of the Rebellion. The authority of General Holt, accordingly, had better not be invoked to support a military jurisdiction over civilians.

4. The next period, from 1877 to 1912, represents the classic period of American military law, when Winthrop wrote his still authoritative work, and when The Judge Advocate General of the Army so vigorously insisted on the Army's observance of constitutional limitations that, when the Attorney General in a momentary lapse had purported to approve military trials of civilians, he recalled to that officer the principles involved, and obtained ultimate disapproval of such trials. See the memoranda printed in Appendix C.

This period also saw the publication of no less than four editions of the Digest of Opinions of The Judge Advocate General of the Army, in 1880, 1895, 1901, and 1912. All of those editions announced the principle that no civilian was constitutionally amenable to trial by court-martial in time of peace. The first three, see page 67, *supra*, also stated that "strictly and properly, there can be no such thing as a camp follower in time of peace," a holding omitted from the 1912 edition only because the class of persons concerning whom this had been said—the post traders—had ceased to exist.

5. The fifth period begins with 1916, when General Crowder successfully urged on Congress the AW 2(d), now the Art. 2(11), jurisdiction. But he undertook no constitutional justification for this extension of court-martial jurisdiction, nor did he even suggest that a constitutional question was involved. It is therefore not possible to attach to Gen. Crowder's position the same weight to which the reasoned expositions of his predecessors in the earlier period are entitled, particularly since both of his inarticulate major premises have since been shown to be unsound.

This fifth period rests, doctrinally, on the assumption that military jurisdiction is properly exercised over all

"cases arising in the land or naval forces," i.e., that the exception in the Fifth Amendment constitutes a grant of military jurisdiction. Although Winthrop had with unerring perception pointed out the fallacy of this assumption (*53), it was uncritically embraced by courts and commentators alike, and was not finally laid to rest until *Toth* v. *Quarles*, 350 U.S. 11, in 1955.

If, therefore, the long continued practice of the officers charged with the administration of a statute is to be given effect, and if that practice is to be considered most weighty when it is supported by a reasoned exposition of the factors shaping it, then, very plainly, the military practice from 1877 to 1912 is the most persuasive of all in demonstrating that trials of the nature now under consideration are not authorized by the Constitution and violate the guarantees of the Bill of Rights.

We cannot forbear to add that the Government appears to share this view, since it has meticulously failed to discuss (or even cite) the opinions of The Judge Advocate General of the Army appearing in the 1880, 1895, 1901, and 1912 editions of the Dig. Op. JAG, and since, if consistent silence is any indication, it seems not yet prepared to acknowledge the existence of the post-trader ruling.

IV. No Controlling or Indeed Persuasive Judicial Authority Sustains the Peacetime Military Jurisdiction Over Civilians That Is Now Asserted.

We discuss "the decided cases" (Pet. Br., No. 21, pp. 61-66) only for the sake of completeness; after all, even a consistent series of lower court cases does not foreclose this Court's examination of the basic constitutional question involved.

It is only necessary to refer to the recapture provision of 1863, that was carried into AW 60 of 1874, AW 94 of

1916 to 1948, and finally into Art. 3(a), UCMJ. The constitutionality of that enactment was fairly consistently sustained over a long period: *In re Bogart*, 2 Sawy. 396, Fed. Case No. 1596 (C.C.D. Calif.); *Ex parte Joly*, 290 Fed. 858 (S.D.N.Y.); *Terry* v. *United States*, 2 F. Supp. 962 (W.D. Wash); *United States* v. *Hildreth*, 61 F. Supp. 667 (E.D. N.Y.); *Kronberg* v. *Hale*, 180 F. 2d 128 (C.A. 9), certiorari denied, 339 U.S. 969. Yet this Court on more complete consideration held the provision invalid. *Toth* v. *Quarles*, 350 U.S. 11.

A. *What was said in* Duncan *v.* Kahanamoku *was dictum and moreover cited wartime cases.*

In *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313, this Court said:

> "*Our question does not involve* the well established power of the military to exercise jurisdiction over * * * those directly connected with such [armed] forces * * *"

—and cited four wartime cases, *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y.); *Ex parte Falls*, 251 Fed. 415 (D.N.J.); *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.); and *Hines* v. *Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U.S. 645, all of which were either in fact or else held to be "in the field."

We have added the italics in the quotation to emphasize that the Court was not considering the question now before it and that whatever was said was dictum on its face; and we have done so primarily because the italicized words do not appear in any of the quotations from the *Duncan* case set forth in Pet. Br., No. 21, at pp. 60, 65, 66.

Otherwise stated, the Government nowhere discloses that the remarks on which it now relies were *obiter*.

Once that circumstance is borne in mind, it becomes apparent that the argument in support of the jurisdiction is being rested on a few words mentioned *arguendo* to show what was not being decided, and that those words are now being put forward on the footing that the Court passed on what it plainly said was not involved.

B. *The lower court cases relied on are either not in point or else quite unpersuasive.*

Apart from the decisions now under review, we have found 16 cases that involved a test of military jurisdiction over civilians. We have divided these into several categories, duly labeled; an asterisk preceding the citation indicates that the decision does not appear in any Government brief presently filed.

(1) The first group includes all wartime cases arising "in the field" as that term was always rigidly and narrowly interpreted both by The Judge Advocate General of the Army as well as by the Attorney General. See rulings collected at pp. 29-32 of the *Singleton* brief in No. 22.

1. *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y.) (Army transport on high seas, World War I).

2. *In re Di Bartolo*, 50 F. Supp. 929 (S.D.N.Y.) (Eritrea in World War II).

*3. *Hammond* v. *Squier*, 51 F. Supp. 227 (W.D. Wash.) (merchant mariner in South Pacific, World War II; jurisdiction not sustained).

4. *In re Berue*, 54 F. Supp. 252 (S.D. Ohio) (Army vessel on high seas, World War II).

5. *Perlstein* v. *United States*, 151 F. 2d 167 (C.A. 3), certiorari granted, 327 U.S. 777, and dismissed because moot, 328 U.S. 822 (Eritrea in World War II).

*6. *Shilman* v. *United States*, 73 F. Supp. 648 (S.D. N.Y.), reversed in part, 164 F. 2d 649 (C.A. 2), certiorari denied, 333 U.S. 837 (Tunisia in World War II).

The *Perlstein* case seems doubtful. There the relator had left Eritrea and proceeded to Egypt; he was apprehended in Egypt, and returned to Eritrea for trial. It may well have been this aspect of a wartime "in the field" case that induced the granting of certiorari—a circumstance which, as it happens, is not noted in the citation at Pet. Br., No. 21, p. 64. Cf. *Toth* v. *Quarles*, 350 U.S. 11.

(II) A second category of cases arose in occupied territory after the close of World War II. There the military jurisdiction, if exercised without discrimination, could be supported by the doctrine of *Madsen* v. *Kinsella*, 343 U.S. 341. In fact, however, compare pp. 92-96 *infra*, the jurisdiction appears to have been asserted under AW 2(d) of 1920, and the opinions sustained it on the basis of that provision.

7. *United States* v. *Handy*, 176 F. 2d 491 (C.A. 5), certiorari denied, 338 U.S. 904 (occupied Germany, 1948).

8. *Greene* v. *France*, 75 F. Supp. 433 (E.D. Wis.) (occupied Germany, 1946).

(III) A third group of wartime cases involved the exercise of military jurisdiction over civilians in the United States in both World Wars on the footing that they were "in the field."

9. *Ex parte Falls*, 251 Fed. 415 (D.N.J.) (cook leaving Army transport at pier in Brooklyn, N. Y.).

*10. *Ex parte Weitz*, 256 Fed. 58 (D. Mass.) (contractor's employee at Camp Devens, Mass.; jurisdiction not sustained).

11. *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.) (quartermaster employee on the Mexican border).

12. *Hines* v. *Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U.S. 645 (quartermaster's stenographer at Camp Jackson, S.C.).

13. *McCune* v. *Kilpatrick*, 53 F. Supp. 80 (E.D. Va.) (cook leaving Army transport at Norfolk).

*14. *Walker* v. *Chief Quarantine Officer*, 69 F. Supp. 980 (D.C.Z.) (engineer employee in Panama Canal Zone; jurisdiction not sustained).

Such of the foregoing cases as sustained the military jurisdiction cannot, it is submitted, be regarded as sound. In the sense expounded by General Devens (14 Op. Atty. Gen. 22), no part of the continental United States, excepting only the westernmost Aleutians in 1942-1943, was ever "in the field" in either World War, and to hold otherwise was simply semanticized assertion: military operations were not in fact in progress. Those cases ignored Washington's sage admonition (34 *Writings of Washington* 160), "that the whole country is not to be considered as within the limits of the camp."

Moreover, the reasoning of the World War I cases—which set the pattern—leaves much to be desired. In *Jochen*, for instance, the Mexican Border was held to be "in the field" because service there was "field service" within the terms of a Quartermaster Manual. In *Hines* v. *Mikell*, South Carolina was held to be "in the field" because Army Regulations and pay statutes so regarded Camp Jackson for purposes of allowing military personnel the commuted value of their quarters. Why those circumstances justified withholding the protection of the Sixth Amendment from civilians is nowhere discussed in those opinions.

(It might also be noted that both *Falls* and *Jochen* proceeded on the now rejected view that the Fifth Amendment constitute a grant of military jurisdiction.)

In any event, none of the foregoing were peacetime cases, such as the ones now before the Court.

(IV) Two recent district court decisions do uphold the jurisdiction now asserted.

15. *In re Varney's Petition*, 141 F. Supp. 190 (S.D. Calif.) (civilian employee of Army in Japan in 1955).

16. *In re Yokoyama*, 170 F. Supp. 467 (S.D. Calif.) (same, in 1958).

We do not find either of these opinions persuasive, essentially because neither takes into account the circumstance that the law officers of the Government consistently limited the operation of "in the field" to a time and place where military operations were in progress. It may be noted in addition that the court in *Varney* specifically refused to follow Judge Tamm in the *Covert* case below, and that the opinion came down while *Covert* was *sub judice* here; and that the court in *Yokoyama* seems to be still unaware that the 1956 opinions in *Krueger* and *Covert* have been withdrawn. See 170 F. Supp. at 473, note 25.

(V) Finally (Pet. Br., No. 21, p. 65, note 44), reference is made to rulings by the Court of Military Appeals that sustained the jurisdiction of courts-martial under Art. 2(11), UCMJ. That tribunal similarly sustained court-martial jurisdiction over Mrs. Dorothy Krueger Smith (*Smith*, 5 USCMA 314, 319), after which this Court held that no such jurisdiction existed. *Kinsella* v. *Krueger*, 354 U.S. 1.

The simple answer is that the question involved, in all of the cases presently before this Court, is the extent of military jurisdiction under the Uniform Code, which includes of course the scope of the Court of Military Appeals' own jurisdiction. Consequently the views of that tribunal as to its own powers are plainly not authoritative when those very powers are in issue. Significantly enough, every ruling of the Court of Military Appeals now cited antedates *Reid* v. *Covert*, 354 U.S. 1.

The result is that, of the decisions of Federal courts of general jurisdiction now relied on, only four deal with trials of civilians by court-martial in time of peace. All but one of those was decided before *Reid* v. *Covert*, 354 U.S. 1, and the sole exception appears unaware that the first opinions in that litigation have been withdrawn.

It follows that the relevant residue of the Government's judicial authorities is not in any sense impressive—an observation that can hardly be dismissed as overstatement.

V. The Government's Arguments as to the Alleged Necessity of Trying Civilian Employees by Court-Martial and the Alleged Lack of Acceptable Alternatives Are Incomplete to the Point of Being Misleading.

We incorporate by reference the discussion at pp. 106-107 of the *Singleton* brief in No. 22 with reference to the basic inconsistency between *Wilson* v. *Girard*, 354 U.S. 524, and the present contentions now being made in support of the military jurisdiction; as well as the suggestion, pp. 108-109 of the same brief, that the Court should call for the production of named recent agreements with foreign countries, agreements which cast doubt on the assertion (Pet. Br., No. 21, p. 76) that all American civilians with the armed forces live in purely American communities.

We pause to note that, although the NATO agreement concedes primary jurisdiction over civilian dependents to the receiving state, it leaves primary jurisdiction over civilian employees to the sending state. What is said in *Singleton* concerning the NATO agreement is consequently inapplicable in this case.

Here again, we will not undertake a point-by-point refutation of the Government's contentions, but will simply note here the significant matters that those contentions fail to mention.

A. *The Government omits to advise the Court that the reason why so many civilian employees are now accompanying the armed forces abroad is purely budgetary.*

Nowhere in the lengthy argument on "practical necessity" (Pet. Br., No. 21, pp. 71-82) is there any mention of the budgetary considerations underlying the presence of so many civilian employees with the armed forces abroad. Yet this fact can easily be established by reference to materials of unimpeachable authenticity.

1. In 1954, the House Committee on Appropriations told the Army (H.R. Rep. 1545, 83d Cong., 2d sess., p. 16) that "one obvious alternative to military manpower is the use of more civilians whose annual cost is considerably less, on the average, than that of the man in uniform."

Sec. 720 of the Defense Appropriation Act of that year (Act of June 30, 1954, c. 432, 68 Stat. 337, 354), therefore authorized the substitution of civilian for military personnel "whenever, in the opinion of the Secretary of the Military Department concerned, the direct substitution of civilian personnel for an equivalent or greater number of military personnel will result in economy without adverse effect upon national defense * * *"

Accordingly, the Army undertook the process of substituting 11,888 civilians for 12,495 military personnel under the title "Operation Teammate." See *Department of the Army Appropriations for 1956*, Hearings before the Subcommittee of the House Committee on Appropriations, 84th Cong., 1st sess., pp. 4, 74, 296-297, 459-463, 1124-1126. As expressed by Brig. Gen. Westmoreland of the Personnel Division of the Army's General Staff (*id.*, pp. 459, 1125):

> "In general terms, this policy provides for the maximum use of civilian personnel in all positions which do not require military skills or military incumbents for reasons of training, security, or discipline.
>
> * * * * * *
>
> "What we are doing is changing the composition of our military-civilian work force by increasing the percentage of civilians."

An official comment on Operation Teammate (*Army Information Digest*, Vol. 10, No. 4 (April 1955), p. 47) was that "The program will permit the Army to retain in service a number of combat units which otherwise would have been inactivated due to reduced personnel ceilings."

In the following year, Congress was advised of the savings effected by Operation Teammate. *Department of the Army Appropriations for 1957*, Hearings before the Subcommittee of the House Committee on Appropriations, 84th Cong., 2d sess., pp. 156, 316 *et seq.*, and see particularly the chart at 318 showing actual savings.

2. In this connection, it is an historical fact that "The Navy's Construction Battalions, popularly known as the Seabees, were established to meet the wartime need for uniformed men to perform construction work in combat

areas." 1 *Building the Navy's Bases in World War II. History of the Bureau of Yards and Docks and the Civil Engineer Corps, 1940-1946* (1947) 133. It was found that, when war came, contractors' employees who were civilians not only lacked the training necessary to defend themselves, but could not consistently with international law bear arms against the enemy. *Id.*

3. If, therefore, civilian employees cannot be tried by court-martial and thus subjected to military control in the degree thought necessary by overseas commanders, it is plain that these employees' positions do require "military incumbents for reasons of * * * discipline" (Gen. Westmoreland, *supra*, p. 144), and that civilians cannot be substituted for such military incumbents "without adverse effect upon national defense" (Sec. 720 of the Act of June 30, 1954, *supra*).

In view of the circumstance that these matters were duly disclosed in 1957 (Supp. Br. on Rehearing for Appellee and Respondent, Nos. 701 and 713, Oct. T. 1955, pp. 143 *et seq.*), it seems fair to infer that the Government's failure to deal with them now indicates that no acceptable answer can be formulated.

B. *The Government omits to explain to the Court why, if its civilian employees must be subjected to military discipline, they cannot be incorporated in the armed forces.*

If there is in fact any practical reason why persons like Guagliardo, Wilson, and Grisham must be under military control and discipline—apart from budgetary considerations, which we submit are inadmissible in a situation that concerns constitutional guarantees of individual liberty—why can they not be given actual military status, as the Navy did in the case of its construction workers?

No showing has been made that such a status would be unacceptable, and, if it were, there is ample power at hand to require and compel the service of the necessary individuals. Just as "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes" (*Buck* v. *Bell*, 274 U.S. 200, 207), so the power that compels a doctor or dentist to serve in the armed forces (*Orloff* v. *Willoughby*, 345 U.S. 83; 50 U.S.C. App. §§454a-454e; Act of Mar. 23, 1959, P.L. 86-4, 73 Stat. 13) is ample to compel the service of an electrician (Guagliardo), an auditor (this petitioner), a cost accountant (Grisham), and—if need be—a nuclear physicist.

We submit that it would not be a convincing argument for subjecting civilians to trial by court-martial in time of peace that the United States is not prepared to pay what it would cost to give them military status, or is similarly not prepared to exert its undoubted power to compel their services in a military capacity.

We say, "would not be"; there is no indication in petitioners' brief in No. 21 that either of these rather obvious alternatives has ever been given any substantial consideration.

C. *The cases of the civilian employees now before the Court fail to establish any inseparable connection between them and their offenses and the military forces.*

Apart from generalities of doubtful value, generalities that still rely on the stale and self-serving *ex parte* communications of the very military commanders whose powers are in issue, and that were adduced in 1957, no specific argument is advanced why the particular civilian employees now involved and their particular offenses demonstrate an inseparable or indeed even a close connection with the military forces.

No such specific argument, we submit, can be made.

(1) In *Grisham*, the employee arrived in France in October 1952 (No. 58, R. 12), he lived in an apartment in the city of Orleans (*id.*), and his wife joined him there either late in November or early in December (R. 13). A few days thereafter, on the night of 6/7 December, following a cocktail party at which one of them became drunk, Grisham killed his wife (*Grisham*, 4 USCMA 694, 695).

From the 7th through the 23rd of December, he was in the custody of the French police (*id.*).

We ask, of what possible concern was this purely civilian homicide on French soil to anyone except the French civil authorities? Certainly nothing in Pet. Br., No. 21, pp. 79-82, under the heading "The need for court-martial jurisdiction," even faintly explains why the mere circumstance that Grisham was employed as a cost accountant by Army engineers (No. 58, R. 12), entitled to some amenities as fringe benefits (R. 13-15) but still on the payroll of the U.S. District Engineer at Nashville, Tenn. (R. 11-12, 13, 15), imperatively required his trial by court-martial, or why (Pet. Br., No. 21, pp. 83-89) trial in a French court for homicide would not equally well have insured the success of the American military mission in the Army's Communication Zone.

(2) In this case, a civilian whom two doctors considered "a psychopathic personality on the borderline of schizophrenia" (R. 45, 46), pleaded guilty (R. 24) to a series of sexual offenses with seven individuals (R. 19-22). Only three of the latter were American soldiers; the nationality of the others is not shown, nor does the printed record indicate whether they were connected with the military community.

Since the soldiers in question were punishable for their acts under Art. 125, UCMJ, it is difficult if not impossible

to understand why this petitioner's conduct could not have been adequately dealt with by the German authorities—if indeed his acts were appropriate for criminal prosecution.[1]

In this connection, it seems to us significant that, in legislating for the District of Columbia, Congress has declared that a person found to be a sexual psychopath is to be committed to Saint Elizabeth's Hospital. Act of June 9, 1948, c. 428, 62 Stat. 347, §§201-209; D.C. Code (1951 ed.) §§22-3503 *et seq.*

Why the maintenance of the American military position in Berlin requires similar action on the part of a civilian there to be tried by court-martial, or just how five years' confinement in a penitentiary (R. 8)—petitioner is now at Fitzsimons Army Hospital only because of a tubercular condition—will assist in arresting petitioner's proclivities, is not sought to be explained.

It could not be.

(3) The record of Guagliardo's trial by court-martial, so we are advised by his counsel, shows that he lived in an apartment in the city of Casablanca, and that, like Grisham, he was originally in the custody of and interrogated by, the local authorities. See ACM 14775, *Hall et al.*, 25 CMR 874, 882, review denied, 26 CMR 516.

Guagliardo was charged with stealing property of the United States and with conspiring with two airmen to do so (No. 21, R. 5). Those acts constituted violations of 18 U.S.C. §§641 and 371, respectively, and involved an injury to the interests of the United States. They accordingly applied to American citizens everywhere in the world (*Blackmer* v. *United States*, 284 U.S. 421; *United States* v. *Bowman*, 260 U.S. 94), with the result that

[1] The question of German jurisdiction is discussed below, p. 100.

Guagliardo and his two co-conspirators could have been flown back to the United States and tried in the first judicial district in which their plane touched American soil. See *Chandler* v. *United States*, 171 F. 2d 920, 932-933 (C.A. 1), certiorari denied, 336 U.S. 918, construing Judicial Code, §41, now 18 U.S.C. §3238.

Nowhere in the course of their 111 page brief in No. 21 do petitioners ever seek to explain, much less actually explain, why it was either impracticable or unacceptable to pursue that remedy, the constitutional validity of which could not have been questioned.

It is admitted (Pet. Br., No. 21, p. 84) that "foreign courts now try civilian employees and dependents in many cases."

"However," the quoted passage continues, "if the offense involves only American personnel or property, it cannot be expected in every case that the jurisdiction of the foreign tribunals will be invoked with the same vigor as if foreign nationals or property were involved."

That assertion would be more persuasive if it were shown that in Guagliardo's case it was the local authorities who evidenced a lack of vigor, and that they did not simply turn him back to the Air Force because the Air Force authorities insisted in trying him by court-martial on their own.

D. *The contentions in support of the jurisdiction simply repeat what was said in 1956 and 1957 and fail to show any genuine effort to restudy the problem of law enforcement in respect of civilian employees overseas.*

On November 7, 1955, this Court in *Toth* v. *Quarles*, 350 U.S. 11, 14, said what of course should always have been

obvious, that the "except in cases arising in the land or naval forces" clause of the Fifth Amendment "does not grant court-martial power to Congress." This holding necessarily destroyed every vestige of doctrinal support for peacetime military jurisdiction over civilians. Cf. Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 Minn. L. Rev. 79, 107.

Mrs. Covert's petition for habeas corpus was filed ten days later (R. 1, No. 701, Oct. T. 1955), and she was released by Judge Tamm on November 22, 1955 (R. 131-134).

Ever since then, and certainly since November 5, 1956, when this Court granted the rehearing in that case (352 U.S. 901), the Department of Defense—which is primarily and perhaps solely interested in this jurisdictional question, the concern of the Department of State being limited to the status of Berlin, as to which see pp. 90, 97, below—even since then, and, preeminently, since June 10, 1957, the date of *Reid* v. *Covert*, 354 U.S. 1, the Department of Defense has been on notice that military jurisdiction over any civilians in time of peace has been, at the very least, extremely doubtful.

Viewing its arguments in the present quartet of cases as dispassionately as is possible for opposing counsel, we are constrained to say that, after careful consideration of what has been advanced, we find reflected therein no evidence of any restudy of the problem of law enforcement in respect of civilians overseas beyond "Let's see if we can't keep *Reid* v. *Covert* limited."

Certainly there is no indication that the matter has been presented to or discussed with Congress with a view to new legislation. Indeed, not even the most obvious gaps have been plugged.

Thus, Chapter 37 of Title 18, Espionage and Censorship, applies "within the admiralty and maritime juris-

diction of the United States and on the high seas, as well as within the United States." 18 U.S.C. §791. If persons without military status cannot be tried by court-martial in peacetime, these provisions are on their face insufficient to reach what the Government urges as vital (Pet. Br., No. 21, p. 87), *viz.*, security violations by civilian employees overseas. Yet no effort appears to have been made to extend the scope of this chapter, a matter that raises no constitutional problem whatever (*Blackmer* v. *United States*, 284 U.S. 421, 437), and which would leave the Government free to return the offender to the United States for trial under 18 U.S.C. §3238.

All that is offered is a rehash of what was presented in 1957, buttressed only by expressions of disagreement with the holding of *Reid* v. *Covert*, 354 U.S. 1 (Pet. Br., No. 21, pp. 91, 98-99).

The basic approach is still that of the Army Board of Review in Mrs. Dial's case (No. 22, R. 22), that:

> "the necessity for military jurisdiction * * * is sufficient to overcome the requirements of Article III and the Fifth and Sixth Amendments."

The infirmities of the argument of necessity were long ago pointed out by this Court, see *Ex parte Milligan*, 4 Wall. 2, 120-121, and Mr. Justice Cardozo with characteristic felicity spoke of preserving our great ideals against "the assaults of opportunism" and "the expediency of the passing hour." [19]

[19] "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but

What is perhaps more immediately pertinent is that, as this brief and the *Singleton* brief in No. 22 amply demonstrate, the Government's present arguments concerning the alleged "practical necessity" and the alleged lack of an "acceptable alternative" omit entirely too much to carry conviction, and that those contentions all too plainly disclose that no real effort has yet been made to find a constitutional substitute for the unconstitutional trials of civilians by court-martial in time of peace.

VI. Even on the Assumption That Berlin Is Still Occupied Territory for All Purposes, Petitioner's Trial by Court-Martial Cannot Be Sustained as an Exercise of Military Government Jurisdiction Over Him.

We will assume (Resp. Br. 14-23) that "Berlin continues under military occupation," for all purposes, and of course we do not question the proposition (*id.*, 8-14) that "Military trials may validly be held in territory under military occupation."

It is our position that it is clear on the present record that no military government jurisdiction was ever sought to be exercised over petitioner; that military jurisdiction over him was never sustained on that basis; that his Art. 2(11) trial cannot now be converted into a military government trial at this juncture; and that, inasmuch as no general military government jurisdiction is now being exercised by the United States forces in Berlin, the purported exercise thereof limited to those civilians who fall within the terms of Art. 2(11) would necessarily be discriminatory and invalid.

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none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith." Cardozo, *The Nature of the Judicial Process*, 92-93.

A. *The Army did not purport to exercise military government jurisdiction over petitioner, his trial was never sustained at any stage on that basis, and it cannot be converted into a military government trial now.*

1. At military law, the charges preferred against an accused who is not in the military service must include "a description of the accused's position or status which will indicate the basis of jurisdiction of a court-martial." MCM, 1951, p. 469, ¶4. This has long been the requirement. MCM, 1949, App 4*c*, p. 311; MCM, 1928, App. 4*c*, pp. 236-237; MCM, 1921, App. 6 (*g*), at p. 566; MCM, 1917, App. 4 (*g*), p. 335.

The charges in the present case (R. 19-22) consistently describe petitioner as "a person serving with, employed by, and accompanying the armed forces without the continental limits of the United States in Berlin, Germany." Those words copied the then (50 U.S.C. [1952 ed.] §552) language of Art. 2(11), UCMJ.

The charges in the present case did not describe petitioner either as "a person resident in occupied territory in Berlin, Germany," or as "a person subject to the law of war."

Thus it is plain, on the face of the proceedings, that the Army undertook to exercise an Art. 2(11) jurisdiction over petitioner as a civilian employed by the armed forces overseas, rather than an Art. 18 jurisdiction under the law of war applicable in occupied territory.

2. The record shows that the question of military jurisdiction in this case, duly raised at the trial (R. 24, 47-52), was not determined by any judicial agency thereafter on the footing that it could be sustained on the basis of Berlin's status as occupied territory.

The Court of Military Appeals very significantly said (R. 55):

> "We prefer to reach the question of jurisdiction in this case under the provisions of subdivision 11 of Article 2 rather than consider whether the circumstances obtaining in Berlin constitute that area occupied territory, as contended by Army Government counsel."

And the District Court, in the course of a lengthy opinion (R. 60-72), did not rest its sustaining of the military jurisdiction over petitioner on military government grounds, although that point was duly made on behalf of the respondent. Memorandum of Points and Authorities in Support of Return of Respondent to Order to Show Cause, *U. S. ex rel. Wilson* v. *Bohlender*, D. Colo., Civ. Action No. 6161, Point V, pp. 35-38.

As we shall show, it is now too late to invoke this alleged alternative basis of military jurisdiction.

3. The question at once will be asked, Why is the present situation any different from that of an indictment which, although alleging an offense against the United States, mis-cites the statute that has been violated? In the latter instance, very plainly, the indictment is good. *Williams* v. *United States*, 168 U.S. 382.

The same rule, that the mis-citation of the Article of War violated does not affect the validity of the charges if they otherwise state an offense under any Article, has long obtained at military law also. See Dig. Op. JAG, 1912-1940, ¶394(2), citing many rulings; MCM, 1951, ¶27; *Olson*, 7 USCMA 460.

4. But military law also includes another rule with respect to jurisdiction, to the effect that if the jurisdiction

of a court-martial is not established at the outset of the proceedings, it cannot be conferred by subsequent ratification. This rule obtained under the Articles of War and has been also applied since the effective date of the Uniform Code.

Thus, under the 1920 Articles of War, in force during all of World War II, sleeping on post by a sentinel was a capital offense in time of war. AW 86; MCM, 1928, ¶14. A special court-martial had no jurisdiction to try capital offenses. AW 13. But under AW 12 the officer competent to appoint a general court-martial had power to refer a capital case to a special court-martial, in which event the sentence adjudged could not exceed that otherwise within the punishing power of the special court-martial.

Even in many overseas areas during World War II, it was utterly unrealistic to consider sleeping on post a capital offense, and accordingly such cases were, in many general court-martial jurisdictions, regularly referred to special courts-martial for trial.

On occasion, however, short-cuts were resorted to, and a sleeping sentinel's case would be referred to a special court-martial by an officer not vested with general court-martial jurisdiction. The question then arose, could the officer who had general court-martial jurisdiction thereafter ratify those proceedings, which were consistent with his policy, or were they to be regarded as void *ab initio*.

The Judge Advocate General held that unless the trial by special court-martial of such a capital case had been authorized in advance by the general court-martial authority, the proceedings were void *ab initio*, and could not thereafter be ratified by the latter officer. 1 Bull. JAG 103, ¶369(9); 9 Bull. JAG 219, ¶370.

The Court of Military Appeals reached precisely the same result in *Bancroft*, 3 USCMA 3, under Arts. 19 and 113, UCMJ, and ¶15*a*(1) of 1951 MCM.

We accordingly submit that, once it is established that there is no Art. 2(11) jurisdiction over petitioner, his conviction cannot now be sustained on the basis that, by a process of subsequent judicial ratification on collateral attack, he could have been charged and tried as a resident of occupied territory, although he was in fact charged and tried as a civilian with the armed forces overseas. The principle of the *Bancroft* case and of the predecessor rulings cited forbids.

5. We are aware that the decision of the Court of Military Appeals in *Schultz*, 1 USCMA 512, is opposed to us on that issue. That decision, plainly, is not controlling, and, for reasons about to be stated, we submit that it cannot be supported.

There one Schultz, an American civilian in Japan, was tried for involuntary manslaughter and drunken driving, being described in the charges as "a person serving with the armies of the United States without the territorial jurisdiction of the United States." See 4 CMR at 576-577. It appeared, however, that he had been employed as the manager of a civilian club supported by non-appropriated funds, and that even such employment had been terminated before the charges were served on him. The Court of Military Appeals accordingly held that in those circumstances he was neither a retainer to the camp nor a person accompanying or serving with the armies so as to render him subject to military law under AW 2(d), then still in effect.

However, the court went on to hold that, Japan being at the time under occupation, the military government

jurisdiction of the general court-martial under AW 12 was sufficient to reach Schultz as a person subject to the law of war. This conclusion was reached (1 USCMA at 520) on the footing that "Jurisdiction is a fact, not a matter of pleading," citing *Givens* v. *Zerbst*, 255 U.S. 11.

We submit that this reliance was misplaced, because the *Givens* case plainly does not extend that far.

There the relator had, while an officer of the Army, been convicted by a general court-martial. On habeas corpus he alleged a want of authority in the officer who convened the court and the failure of the record to show his own status as an officer in the Army. These matters were either within the realm of judicial notice or else proved at the habeas corpus hearing. Therefore, this Court held that the only question presented was (255 U.S. at 19-20):

> "In a case such as that before us, where the power to convoke a court-martial is established on the face of the record, and the authority of the court to decide the particular subject before it is therefore undoubted, does the right exist, in the event of a collateral attack upon the judgment rendered, made on the ground that a particular jurisdictional fact upon which the court acted is not shown by the record to have been established, to meet such attack by proof as to the existence of the fact which the court treated as adequately present for the purpose of the power exerted?"

This Court held (255 U.S. at 20):

> "Considering that subject in the light stated, we think the court below was right in admitting, as it did, evidence to show the existence of a military status in the accused, since it did not change the court-martial record, but simply met the collateral attack by show-

ing that, at the time of the trial, the basis existed for the exertion by the court of the authority conferred upon it."

Now, since every one of the allegations disputed on habeas corpus clearly appeared on the face of the record of trial by court-martial, and the proof at the hearing on the writ simply went to sustaining those allegations, it seems plain to us that *Givens* v. *Zerbst* is not authority for substituting entirely different allegations of jurisdiction, as the Court of Military Appeals in *Schultz* thought.

For *Givens* v. *Zerbst*, 255 U.S. 11, holds, not that "Jurisdiction is a fact, not a matter of pleading" (1 USCMA at 520), but only that the truth of jurisdictional averments in the proceedings of a court of limited jurisdiction can be independently established on collateral attack, and that such proof is not limited to what is found within the four corners of the challenged proceedings.

Nothing in *Givens* v. *Zerbst*—or in any other case of which we are aware—gives any support whatever to the Court of Military Appeals' *Schultz* doctrine that a proceeding commenced under one head of jurisdiction can, upon appellate challenge, be somehow transformed into a case under a very different head of jurisdiction, least of all when the transformation is sought to be made on collateral attack. For that would "change the court-martial record" (255 U.S. at 20).

Or, to paraphrase a recent observation, "He that takes the jurisdictional sword shall perish with that sword." *Vitarelli* v. *Seaton*, 359 U.S. 535, 547.

6. We submit, therefore, that a complete answer to the respondent's attempt to sustain military jurisdiction on military government grounds in the present case is the undoubted fact that the jurisdiction was never at any time rested on those grounds.

We do not dispute—indeed we could not dispute—the proposition (Resp. Br. 8-14) that "Military trials may validly be held in territory under military occupation." We say only that the military government jurisdiction authorized by Art. 18, UCMJ, was never exercised in this case.

B. *No military government jurisdiction has in fact been exercised in Berlin by the United States since May 5, 1955.*

The underlying principles of military government jurisdiction in occupied territory were reaffirmed and restated in *Madsen* v. *Kinsella*, 343 U.S. 341. Thereafter, when the occupation of Germany by the three Western powers was brought to an end, the United States terminated the jurisdiction and abolished the courts pursuant to which Mrs. Madsen had been tried. And such abolition extended to Berlin as well. Art. 4, *Convention for the Settlement of Matters Arising out of the War and the Occupation*, TIAS 3425, p. 295, at pp. 301-304; Proclamation of May 5, 1955, 32 Dept. of State Bull. 791; Ex. Order 10608, 20 Fed. Reg. 3093.

And this is duly admitted by the Government—although only in a footnote (Resp. Br. 21, note 16):

> "Occupation courts in Berlin have presently ceased to function."

That admission underscores what is amply demonstrated by the present record, namely, that no military government jurisdiction was in fact exercised over this petitioner.

C. *It follows that any attempt to exercise a military government jurisdiction limited to American civilian accompanying the armed forces would be discriminatory and hence invalid.*

In the footnote just cited (Resp. Br. 21, note 16), it is further said

> "The power to convene them [i.e., occupation courts in Berlin] still exists, but the practice now is to refer to a court-martial all criminal cases which might have previously been heard in an occupational court."

Evaluation of the quoted assertion requires that the jurisdiction of military government courts in occupied territory under accepted principles of international law be briefly examined. As this Court pointed out in *Madsen* v. *Kinsella,* 343 U.S. 341, after a full review of the authorities, the jurisdiction of such tribunals extends to all persons in the occupied territory, and covers not only the enemy nationals of the occupied areas but also all persons of whatever nationality who are resident in that territory, including American civilians accompanying the American forces, such as Mrs. Madsen in that case.

In the United States Zone of Berlin, therefore, that jurisdiction would include:

(a) German nationals;

(b) Nationals of other countries (e.g., Britain, France, etc.) resident in that Zone;

(c) Americans resident in the United States Zone who have no connection whatever with the armed forces, such as business men, representatives of American airlines and the like; and

(d) Americans actually accompanying, serving with, or employed by the United States Forces there, such as de-

pendents, Government officials actually connected with the forces, and employees like the petitioner.

To the extent therefore, that the asserted military government jurisdiction in Berlin was limited to the last of these four classes, it would, although fair on its face, be a discriminatory jurisdiction, and hence invalid in the classic sense of *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374, of being "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances." See also, *accord*, *Griffin* v. *Illinois*, 351 U.S. 12, 17, and cases there cited.

True, the foregoing is a Due Process point, and military government represents an exercise of the war power; but this Court has made it clear that the Due Process Clause limits even an assertion of the war power. *United States* v. *Cohen Grocery Co.*, 255 U.S. 81; cf. *Ex parte Endo*, 323 U.S. 283.

We should think it extremely doubtful, having regard to the relations existing between the United States and the Federal Republic of Germany, that, notwithstanding the existence of reserved paper powers, any German national or any resident of Berlin, American or otherwise, unconnected with the armed forces, has been tried by an American court-martial or by any other American tribunal in Berlin since May 5, 1955. But unless such a showing can be made, then the present exercise of court-martial jurisdiction over this petitioner cannot be supported by the invocation of Art. 18, UCMJ.

We recognize that it will probably not be necessary to explore the issue of discrimination. For the fact, amply evidenced by this record, is that the United States has not sought to exercise its reserved powers of military gov

ernment jurisdiction in Berlin when trying by court-martial civilians with the armed forces, but has simply proceeded on the assumption that it was exercising the purported Art. 2(11) jurisdiction over such civilians under the provisions of the Uniform Code of Military Justice. Even the Court of Military Appeals, which must be taken as expressing the authoritative military view in this connection, proceeded on that basis in the present case (R. 55).

In the interest of completeness, a few words should be said regarding the jurisdiction of the German courts in Berlin to deal with petitioner in respect of the offenses with which he was charged.

There are indications in the record (R. 50, 55) that under Allied Kommandatura Law No. 7 he was not subject to the criminal jurisdiction of the Berlin courts. But the Government's brief (p. 21) makes it clear that the American sector commander could authorize the German courts to exercise criminal jurisdiction over any accompanying civilian under Article 1 of this precise Law No. 7 that was cited in the military proceedings. Consequently denial of American military jurisdiction over accompanying civilians in Berlin who commit offenses there would not in any sense mean that they would go unpunished for their acts.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with directions to discharge petitioner from military custody forthwith.

Respectfully submitted.

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APPENDIX A

Trials of Civilians by Courts-Martial of the Continental Army Recorded in General Washington's General Orders

The *Writings of Washington* have been examined for the period from Washington's assumption of command at Cambridge in 1775 until the relinquishment of his commission in 1783. The first general order appearing therein that announces the result of a trial by general court-martial is dated July 7, 1775 (3:313), the last one bears date of June 16, 1783 (27:16).

Trials of civilian employees are separated from trials of spies and inhabitants; spies were triable under the laws of war, while inhabitants were tried under resolutions of the Continental Congress and not under the Articles of War. See the text, *supra*, pp. 33-35, where this is set forth in detail.

Cases not noted by the Government (Pet. Br., No. 21, pp. 40-42, n. 25) are prefixed by an asterisk.

Part I—Civilian Employees

*1. 9:99 Aug. 19, 1777, Edward Willcox, Quarter Master to Captain Dorse's troop.

2. 9:101, Aug. 20, 1777, Jacob Moon, Pay Master to the 14th Va. Regt.

3. 10:359, Jan. 28, 1778, Thomas Scott who acted in the Character of a Waggon-Master.

4. 10:507, Feb. 24, 1778, Mr. Edward Bernett, Forage Master in the Marquis LaFayette's division.

*5. 11:141, Mar. 24, 1778, Mr. Vunch Quarter Master to Colo. Livingston's Regiment tried (by his own consent).

*6. 11:155, Mar. 26, 1778, Commissary Gambol.

*7. 11:254, Apr. 13, 1778, Adam Gilcrest an Assistant Forage-Master.

*8. 11:280, Apr. 19, 1778, Hugh Baker, Forage Master.

*9. 11:367, May 9, 1778, Robert Anderson, late Waggon-Master in the Marquis's Division.

10. 11:487, May 29, 1778, William Whiteman, Waggoner.

*11. 12:183, Oct. 31, 1778, Nathan Nuthall, Quarter Master to the 3rd No. Carolina Regt.

12. 12:242, July 27, 1778, Mr. James Davison, Quarter Master of Colo. Livingston's Regt.

*13. 12:415, Sept. 9, 1778, Samuel Bond, Assistant Waggon Master.

*14. 12:416, Sept. 9, 1778, Mr. Allen, Quarter-Master to the 2d Pa. Brigade.

15. 13:314, Nov. 23, 1778, George Albin, Express Rider.

*16. 14:425, Apr. 22, 1779, Commissary Lewes.

*17. 15:70, May 14, 1779, Samuel Fleming, Forage Master.

*18. 15:365, July 4, 1779, William Shields, Waggon Master to the North Carolina Brigade.

*19. 16:127, Aug. 18, 1779, Mr. John Price, Assistant Commissary of Forage.

20. 16:285, Oct. 1, 1779, Benjamin Ballard, late Assistant Commissary of Issues to Gen. Paterson's Brigade.

21. 16:386, Oct. 1, 1779, Mr. Paterson, Assistant Commissary of Hides.

*22. 16:400, Oct. 3, 1779, Mr. Thornton Taylor, Conductor of Military Stores to Gen. Woodford's Brigade.

*23. 16:479, Oct. 17, 1779, Job Scribner a Conductor of Waggons.

*24. 18:91, Mar. 8, 1780, Mr. Tychnor Deputy Commissary of purchases.

*25. 18:98, Mar. 9, 1780, Jacob Bailey, Esq., Deputy Quarter Master General.

*26. 18:269, Apr. 17, 1780, Mr. Randall, State Clothier for the State of Maryland.

*27. 19:208, July 18, 1780, William Hutton, Provost Marshal.

*28. 19:468, Aug. 29, 1780, Mr. Israel Weed, Assistant Commissary of Issues.

29. 20:24, Sept. 2, 1780, Reuben George, an express rider.

30. 20:25, Sept. 2, 1780, Joseph Smallwood, a waggoner.

31. 20:961, Sept. 27, 1780, Thomas Thomson, Forage Master to Gen. Hand's Brigade.

32. 20:97, Sept. 27, 1780, Abraham Cooper, a waggoner.

*33. 20:154, Oct. 11, 1780, Mr. John Christie, Forage master to Gen. Clinton's brigade.

*34. 20:199, Oct. 16, 1780, Mr. Isaac Tichener, Assistant Commissary for the Northern Department.

*35. 20:271, Oct. 31, 1780, George Berrien and James Berrien, Boatmen.

36. 21:10, Dec. 24, 1780, Mr. Benjamin Stevens, issuing Commissary at Fishhill.

37. 21:22, Dec. 28, 1780, Mr. Thomas Dewees, Barrack master.

38. 21:215, Feb. 11, 1781, Mr. Joseph Bass, clothier for the State of New Hampshire.

39. 21:354, Mar. 23, 1781, John Collins, late Assistant Deputy Commissary of M[ilitary] Stores (see 21: 190).

*40. 21:496, Apr. 22, 1781, Mr. William Hutton, Provost Marshal.

*41. 22:423, July 27, 1781, John Adam, Deputy Commissary of Prisoners.

*42. 26:261, Mar. 27, 1783, Mr. Samuel Evans, Forage Master.

*43. 26:445, May 19, 1783, Mr. Bartholemew Fisher, Forage master.

Part II—Spies and Inhabitants

*44, 45. 10:508, Feb. 24, 1778, Henry Lewis and John Hambleton, inhabitants.

*46-50. 11:11-12, Mar. 1, 1778, five inhabitants.

*51. 11:86, Mar. 15, 1778, Edward Grissel, inhabitant.

*52-57. 11:142-143, Mar. 25, 1778, six inhabitants.

*58. 11:202, Apr. 3, 1778, William Morgan, inhabitant.

*59-60. 11:253, Apr. 13, 1778, Philip Culp and John Broom, inhabitants.

*61. 11:254, Apr. 13, 1778, John Evans, inhabitant.

*62. 12:71, June 17, 1778, John Shay, an inhabitant.

*63. 12:299, Aug. 8, 1778, Anthony Matica, inhabitant.

*64. 12:299, Aug. 8, 1778, William Cole, suspicion of being a spy.

65-66. 13:54, Oct. 10, 1778, two civilians for counterfeiting and strong suspicion of spying.

*67. 15:363, July 4, 1779, Isaac Depue, aiding the enemy.

*68-70. 15:364, July 4, 1779, John King, aiding the enemy; Joseph Bettys and Stephen Smith, spies.

*71. 15:407, July 11, 1779, John Springer, a spy (also tried for advising desertion).

*72-74. 19:23, June 18, 1780, three spies.

*75-77. 19:221, July 20, 1780, three civilians tried on suspicion of being spies.

*78. 19:252, July 26, 1780, Robert Thomas John Richards, spy.

APPENDIX B

Instances of Civilians Tried by American Courts-Martial, 1793-1798

Below are listed all of the instances that we have found of civilians tried by American courts-martial during the 1790s, arranged chronologically, and showing the date and headquarters of the order announcing the result of trial, the name and character of the accused, the charge, the findings, and the sentence. Where no action by the convening authority is noted, the sentence adjudged by the court-martial was approved and ordered into execution.

An asterisk preceding the cases indicates doubt concerning the accused's civilian status; see *supra*, pp. 28 and 41-43.

A. *Wayne Orderly Books*

All of the entries in the Orderly Books of Major Gen. Anthony Wayne, except for the period Nov. 17, 1792 to April 11, 1793, have been printed in 34 Mich. Pion. & Hist. Coll. 341. The balance are in MS. at the Historical Society of Pennsylvania in Philadelphia.

In the references that follow, page numbers refer to the printed portions, "MS." to those still unprinted.

1. "Saml. Wilson a carpenter in the employment of the United States"; H. Q. Legion Ville, [Pa.] Jan. 19, 1793 (MS.).

Charge: "For purchasing spirituous Liquors and for supplying the soldiers of the United States Contrary to general orders."

Findings: Guilty.

Sentence: "to be drummed out of the Cantonment from the Grand Parade, with two bottles of whiskey Suspended about his Neck." (Sec. XIII, Art. 23, cited.)

2. "George Ludwell a sutler"; H.Q. Green Ville, July 25, 1794 (p. 535).

Charge: "bringing or being concerned in bringing Whiskey into Camp contrary to the General Orders of the 26th of February last and for disposing of whiskey to soldiers."

Findings: Guilty.

Sentence: "to receive one hundred lashes & be drummed out of Camp."

3. "Solomon Brewer a Trader"; H.Q. Green Ville, July 25, 1794 (p. 535).

Charge: "Keeping a disorderly store and suffering soldiers in at a late Hour of the Night of the 21st Inst. Disposing of Spirituous Liquors, in Breach of Gen'l Orders, and Playing at Cards with Soldiers."

Findings: "Guilty of every part of the charge, but selling of Liquors."

Sentence: "to be Drummed out of Camp with a Dirty Pack of Cards about his neck."

4. "Joseph Robinson a Trader"; H.Q. Green Ville, July 25, 1794 (p. 536).

Charge: "extortion & Imposition in his dealings with the soldiery."

Findings: "acquitted for want of evidence."

5. "Philip Reily a soldier, and Samuel Farewell a sutler"; H.Q. Green Ville, July 25, 1794 (p. 536).

Charge: "Gambling, Cheating and Defrauding Serjeant Healey out of Ninety five Dollars, his Property."

Findings: Guilty as to both.

Sentence: "One hundred lashes each; That Farewells property be seized, and he remain in Custody until he refunds the sum of Ninety five Dollars to Serjeant Healey, and that the said Farewell be Drummed (out of Camp) round the Cantonment in front of the Hutts of the soldiery,

from the Grand Parade, with the following label on his forehead—The just reward of Cheating and Gambling, and a Pack of Cards suspended about the Neck—The Court also sentence that in case Farewell's property should be insufficient to reimburse the above Sum; That the Deficiency be made up to Serjeant Healey out of the Pay of Reily, to be stopped for that Purpose."

Action: Confirmed, "except reimbursing Serjeant Healy who ought to be punished as a Gambler."

6. "Robert Bowles in the employ of the Contractor"; H. Q. Miami Villages, Sept. 24, 1794 (p. 555).

Charge: Not shown.

Sentence: "to ask Pardon of Mr. Sloane, in Presence of the Men now employed by the Contractor on this Ground."

*7-11. "William Glinn, William Coyle, Sam'l Blue, William Crocker, and John Fricker, Armourers, in the Employ of the United States"; H.Q. Green Ville, Jan. 31, 1795 (p. 583).

Charge: "stealing a Kegg of Whiskey, and Secreting it in their Quarters."

Findings: Guilty.

Sentence: "under Article 5th of the 18th Section of the Rules and Articles of War, Sentence each of them to Receive 100 Lashes & have their Rations of Whiskey stopped, until a reimbursement of 1 1/2 Gallon be made to the Q'r Master."

Action: "Orders that the corporal Punishment take Place accordingly, upon the Grand Parade, at 10 OClock Tomorrow Morning, after the Manoeuvr'ing the Guards, in the most exemplary Manner—when the Prisoners are to return to their Work, in the Artificers Yard & Shop—"

*12-15. "George Flanks, Charles Munroe, Stephen Ogden and John Small, Artificers, in the Employ of the Quarter Master General"; H.Q. Green Ville, Jan. 31, 1795 (p. 584).

Charge: "stealing & secreting Whiskey."

Findings: Guilty.

Sentence: "under Article 5th of Section 18th of the Rules and Articles of War, sentence each of them to pay for 2 1/2 gallons of whiskey, and to receive 100 Lashes."

Action: Action in cases 7-11 covered these cases also.

16-17. "Isaac Vanhist and Nathaniel Reader, Sutlers"; H.Q., Green Ville, Feb. 23, 1795 (p. 586).

Charge: "selling spirituous Liquors, to a soldier [or] Soldier of the Legion, contrary to a General Order" [of the 24th of January and the 6th of July 1794].

Findings: Guilty.

Sentence: "The Court * * * are of Opinion, they ought to be ordered out of the Cantonment, without the Liberty of returning to it at any time hereafter, in the Capacity of Sutlers."

Action: "Orders that the said Isaac Vanhurst [and] Nathanial Read * * * depart from the Cantonment immediately and never to return to it again in the capacity or Capacities of Sutlers on pain of Corporal Punishment."

18-19. "William Shannon a Sutler, and Matthew Gill, late a soldier in Captain Veters's Company"; H.Q., Green Ville, Feb. 23, 1795 (p. 586).

Charge: "Disobedience of Genl. Orders, Prohibiting the Sale of Whiskey, or other Spirits, and with attempting to Defraud Andrew Derring a Discharged Soldier of Twenty Dollars in charging an exorbitant Price for Goods contrary to a General Order regulating Prices—"

Findings: Guilty.

Sentence: "they are of opinion that Shannon ought to be compelled to leave the Cantonment immediately, and never be permitted to return to it again, in the Capacity of a sutler—the Court also Sentence Matthew Gill to receive 100 Lashes, and to be Drummed out of the Cantonment."

Action: As to Shannon, same as in cases 16-17; "and also orders that Matthew Gill receive the Corporal Punishment to which he is sentenced * * * and then be Drummed out of the Cantonment."

20-22. "William Irvin, Peter Walton, and Edward Gordon" [not otherwise described]; H.Q., Green Ville, Feb. 24, 1795 (p. 587).

Charge: "having in their Possession three Horses, the Property of the United States."

Findings: "Guilty of having three Publick Horses in their possession."

Sentence: "The Court * * * are of opinion they ought to lose the Money, they have Paid for the said Horses, which will be a Punishment Adequate to their Guilt."

23. "Patrick Hanabury an Artificer"; H.Q., Green Ville, May 20, 1795 (p. 612).

Charge: "repeated Drunkinness and Neglect of Duty."

Sentence: "under the 23rd Article of the 13th Section & 5th Article of the 10th [18th] Section of the Rules and Articles of War, to receive fifty lashes."

24. "William Haverland, a Sutler"; H.Q., Green Ville, June 10, 1795 (p. 618).

Charge: "Selling Liquor to a soldier on the 5th Instant, in Violation of General Orders, Prohibiting the same, on a forged permission."

Findings: Guilty.

Sentence: "under the 23rd Article of the 13th Section of the Rules and Articles of War, to be Drummed out of the Cantonment with Two Canteens or Bottles suspended about his Neck; and thence to and along in front of the Guards on the Grand Parade, and out of the Camp; and never to return in any Capacity, on Penalty of receiving such immediate Punishment as may be inflicted upon him."

25. "Samuel Shepherd a Pack Horse Man"; H.Q., Green Ville, July 5, 1795 (p. 626).

Charge: "Stealing a Publick Horse, and Bells Off Publick Oxen."

Findings: Guilty.

Sentence: "under the 23rd Article of the 13th Section, and the 5th Article of the 18th Section, of the Rules and Articles of War, to receive One hundred lashes, and to be drummed round the Cantonment, and thence out of Camp with six bells suspended about his Neck."

26-28. "Robert Mooney, Adam McKee, and Peter Griffin" [not otherwise described]; H.Q., Green Ville, July 5, 1795 (p. 627).

Charge: "stealing Bells off Publick Oxen."

Findings: "Acquitted by the Court for want of Evidence."

Action: "are to be immediately liberated."

29. "John Johnston, a Pack Horse Master"; H.Q., Green Ville, Sept. 15, 1795 (p. 644).

Charge: Neglect of duty in making unnecessary Delays, and in attention to the safe keeping, and Preservation of the Publick Horses, under his direction, from the 27th of August to the 9th of September on a Command to Fort Wayne, and back again; so that out of One hundred & eighty five Horses, committed to his charge; only One hundred & Thirty have been returned—Fifty five of them having been lost thro' his Neglect."

Findings: "Guilty of [Neglect of] Duty, in not obliging the Men under his Command, to do their Duty, by reason whereof sundry Pack Horses in his Charge were lost."

Sentence: "under the 23d Article of the 13th Section and the 5th Article of the 18th Section, of the Rules & Articles of War; to be Dismissed the service of the United States, & to forfeit three Months Pay, to compensate the United States, for the loss sustained by his Neglect."

Action: "Orders * * * that John Johnston be confined in the Provost Guard until he refund to the Acting Quarter Master General, Three Months Pay, agreeably to his Sentence."

30. H.Q. Greenville, Feb. 29, 1796 (p. 680).[1]

"Peter Minard the Deserter & Betts the Whiskey Smuggler will be drummed out of Camp tomorrow after the Guards are mounted * * * The Commissary is to furnish three Days full Provision to each."

B. *Orderly Books of the Corps of Artillerists and Engineers*

Four volumes entitled as above are in the Library of the United States Military Academy at West Point, N. Y. The entries run from May 7, 1795, to May 19, 1799; the last entry is on a separate slip that is pasted into the book but not copied.

30A. "* * * a woman by name Polly Toomy"; General Order, July 31, 1795 (1 *Orderly Book of the Corps of Artillerists and Engineers* 73).

No trial. Offense was that after having been drummed out of the Garrison three times, "the last being yesterday evening she has again returned the same night in defiance of the Garrison orders."

Ordered by the Commandant, Major Tousard, that "the said Polly Toomy shall be drummed out again and receive twenty lashes on her bare back * * *"

For the complete text of the order, see p. 60 of the *Singleton* brief in No. 22.

31. "Jacob Neilson Sutler belonging to this Garrison"; Oct. 7, 1795, vol. I, pp. 159-162.

Charge: "selling Liquors to the Garrison Soldiers contrary to orders."[2]

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[1] Entry while Brig. Gen. Wilkinson was temporarily commanding in Maj. Gen. Wayne's absence; see Gen. Wayne's farewell, Dec. 14, 1795 (p. 659), and Gen. Wilkinson's assumption of command, Dec. 16 (p. 660).

[2] See p. 46, *supra*, for a partial text of the orders.

Findings: Guilty.

Sentence: "to pay a fine of Fifty Dollars to the United States, and do further direct that the Store from which he sold Liquor contrary to orders, be closed immediately."

Action: "Considering however the Case of Jacob Neilson, he remits to him the half of the Fine and orders the said Neilson to be kept under guard until the other half is paid into the Hands of the Paymaster, and suspends the second part of the Sentence until the first breach against the orders issued to Sutlers the 26th Septr. 1795. J.J.U. Rivardi, Comdt. pro tem."

C. *Wilkinson Order Book*

The Wilkinson Order Book is a bound MS. volume containing 767 legibly numbered pages. It is in the Early Wars Section, War Records Division, National Archives; the entries therein run from Dec. 31, 1796, until April 23, 1808.

32. "William Mitchel Suttler"; H.Q. DEtroit, July 20, 1797 (pp. 57-60).

Charge: "violation of the General Order of the 12 Instant, in selling liquor without permission to a soldier."[1]

Findings: Guilty.

Sentence: "under the General Order of the 12th Instant, and the 23d Article of the 13 section of the rules and articles

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[1] This order (p. 48) was as follows:

"The desertion of the Troops may be ascribed chiefly, to the scene of drunkenness produced by the unashamed Sales of liquor, which have been permitted, and to the seductive acts of persons indisposed to the Government of the United States.

"To remedy evils replete with consequences to the National Interests and so subversive of subordination and discipline. All persons are hereby prohibited selling liquor of any kind to the Troops, except under the written permission of Lieut. Colonel Commandant Strong—the infraction of this order by whosoever committed, shall be punished by the guard House, and the sentence of a General Court Martial.

"Any person attempting to inveigle a soldier from his duty, or in advising him to desert shall receive Fifty lashes, and be drummed out of the fortifications."

of War, to be drummed with a bottle suspended about his neck, with the *rouges* March (together with Lydia Conner a prisoner convicted of the like Offense, his left hand tied to her right) through the Citadel, in front of the Troops paraded; thence through the Streets of the Town, thence to and around the front of the barracks of the Soldiery in Fort Lernault, thence out of the Fort to and along the main Street, and out of the West or South West Gate of the town, not to return therein; to be forever prohibited from acting in the capacity of a trader or sutler within the lines or fortifications of the Troops of the United States, on penalty of receiving such punishment as may be inflicted upon him, by the sentence of a Court Martial."

Action: "However highly merited, he [i.e., Gen. Wilkinson] remits so much of the Sentence passed upon Mitchel, as relate to drumming, and he flatters himself that this instance of his clemency, may not be misapprehended, as no further indulgence must be expected."

33. "Lydia Conner a follower of the Army": H.Q. DEtroit, July 20, 1797 (pp. 58-60).

Charge: "Violation of the General Order of the 12th Instant."

Findings: Guilty.

Sentence: Same as Mitchel's, "her right hand to be tied to his left"; see pp. 62-63 of the *Singleton* brief in No. 22 for the exact text.

Action: "The Sentence passed upon Lydia Conner, a notorious Offender, is to be carried into execution at 6 O'Clock this afternoon."

34. "James Fraser a Merchant of D'Etroit": H.Q. DEtroit, July 20, 1797 (pp. 59-60).

Charge: "Violation of the General Order of the 12th Instant."

Findings: Guilty.

Sentence: "but as there is a possibility (from the words *ardent Spirits* being included in the proclamation, and not in the General Order) that he might have misconceived the latitude of the order, they only sentence him, under the General Order of the 12th Instant, and the 23d Article of the 13 Section of the rules and articles of War, to be reprimanded by the Commander in Chief in such manner as he may think proper."

Action: "With respect to Mr. Fraser, the Commander in Chief will observe, that as he can never be indifferent to the feelings of any person: Should the transgression have originated in Misapprehension, he regrets the Occasion, otherwise he hopes the process may be received as an evidence of the impartiality of the administration and of the lenity of the Court, and that it will have the effect to prevent a repetition of the Offence, which cannot be permitted or pardoned."

35. "Mathew McFall" [not otherwise described]; H.Q., D'Etroit, July 28, 1797 (pp. 66-67).

Charge: "enticing and endeavouring to persuade Jeremiah Hyland a soldier in the Service of the United States to desert therefrom."

Findings: Guilty.

Sentence: "under the 23d Article of the 13 Section of the rules and articles of War, and the General Order of the 12 Instant to receive Fifty lashes, to be inflicted with wire cats, to have the left side of his head and his right Eyebrow close shaved, to be drummed with a rope about his Neck, his head uncovered, through the citadel and Fort Lernault, then through the streets and out of the Town, and not to return within the lines or fortifications, on penalty of receiving such punishment as may be inflicted upon him."

36. "John McKergan" [not otherwise described]; H.Q. D'Etroit, July 28, 1797 (pp. 66-67).

Charge: "violation of the General Order of the 12th Inst. in selling liquor to the Soldiery."

Sentence: "under the 23 Article of the 13 Section of the rules and articles of war, and the General order of the 12th Instant, only, to be expelled the lines and fortifications of the place (in consequence of his age, infirmity, and the character of him) and not to return therein on penalty of such punishment as may be inflicted upon him."

37. "Robert Kean a sutler"; H.Q. D'Etroit, Sept. 11, 1797 (p. 79).

Charge: "selling Liquor to soldiers without permission."

Findings: Acquitted.

38. "John Blackburn a follower of the Army," tried by garrison court-martial; H.Q. Pittsburgh, April 3, 1798 (p. 108).

Charge: "disobedience of orders in bringing whiskey into the Garrison."

Findings: Guilty.

Sentence: "to receive twenty five lashes on the bare back but in consideration of his Age and infirmity recommended by the Court to the mercy of the Commander in Chief."

Action: "The Commander in Chief approves the foregoing sentences * * * but in Consideration of the Recommendation of the Court he remits the punishment to which Blackburn and * * * were sentenced."

39. "Mathias Augustine a Subject of His Catholic Majesty's" [not otherwise described]; H.Q. Lo'tus's Heights [Miss. Terr.], Nov. 19, 1798 (pp. 168-169).

Charge: "selling spirits to the troops without permission." Plead guilty.

Sentence: "to receive one hundred lashes, & to be drummed out of Camp with two bottles suspended by his neck."

Action: "It appears that the prisoner offers the Plea of Ignorance in extenuation of his confessed guilt,—yet it is set forth explicitly by the testimony offered on his trial

that his sales were made in a clandestine manner and that he has been guilty of falsehood in alledging to the Court the liquor sold was laid in for the consumption of his crew. —such strong evidence of conscious misconduct in the first instance and turpitude in the last, leave no doubts in the General's mind of the motives & the merits of the prisoner. He therefore approves of the sentence of the Court, but in Consideration of the amicable connexion subsisting between his Majesty of Spain and the United States of America in regard to the clemency due to a foreigner as a testimonial of the respect in which we hold a Sovereign power, and as a manifestation of our disposition to cultivate that harmony which is reciprocally interesting to the two nations the General thinks proper to remit the punishment and orders the prisoner with his property to be dismissed the verge of the Camp."

APPENDIX C

Full Text of the 1877 Opinions of the Judge Advocate General of the Army Holding Peacetime Trials of Civilians by Court-Martial to Be Unconstitutional

The originals of the following opinions of The Judge Advocate General of the Army appear in 38 Bureau of Military Justice—Letters Sent 557 and 641 (MS., Nat. Arch.), and resulted in the opinions of the Attorney General that were published in 16 Op. Atty. Gen. 13 and 48.

We have reprinted the texts which follow from pp. 86-99 of the Reply Brief for Appellant and Petitioner on Rehearing, Nos. 701 & 713, Oct. T. 1955.

WAR DEPARTMENT,
BUREAU OF MILITARY JUSTICE,

April 16, 1877.

HON. GEO. W. MCCRARY,
Secretary of War.

SIR: I have the honor to return herewith the accompanying papers, referred to me from your Office, "for remarks," and to submit thereon as follows:

1. These papers relate—*first*—to the question of the amenability to military jurisdiction and trial by court martial of *Superintendents of National Cemeteries*. This question, having been brought up by the Quartermaster General, and referred to this Bureau, I had the honor to recommend, by the within endorsement of November 27th last, that the question be submitted to the Attorney General for opinion, and it was submitted accordingly on Dec. 6th last. I had indeed no doubt myself on the question, nor had my predecessor, Judge Advocate General Holt, who, on Oct. 1873, had given an official opinion to the effect that, in view of the fact that Superintendents of Cemeteries were no part of the army, but civilians, being indeed required to be civilians by positive statute—R. S., Sec. 4874 the only law on the

subject* to hold them amenable to the military jurisdiction in time of peace involved an absurdity. This is certainly my own view; it being further my opinion that the 63d Article of War† refers to, and is operative only in, (as the terms "camp" and "in the field" indicate,) a time of war, i. e., war with a foreign power, or with Indians, or a civil war; and can have no application in time of peace. Sundry other of the Articles of War are applicable only to time of war; and, as to this, or any other, Article or Statute, even if it did *in express terms* assume to extend the military jurisdiction to civilians in time of peace, it would, in my opinion, necessarily be unconstitutional and of no legal effect. In my view, no possible case can arise, in time of peace, where a civilian can legally be made liable to military arrest and trial for a criminal or other offence, and any statute which attempts to render him so amenable must necessarily be wholly void. In time of *war* civilians serving with troops engaged in hostile operations, become, for offences committed upon the theatre of war, amenable under the 63d Article above cited, and indeed independently of it, to the Military jurisdiction. So, during the prevalence of Martial law or Military government, (See Opinion of Chase, C. J., in *In re* Milligan, 4 Wall. 142,) civilians may be made so amenable in particular cases, though here the exceptional jurisdiction can properly be enforced only with great delicacy and caution. But except in these instances, such a jurisdiction cannot be exercised without, in my judgment, the clearest violation of the Constitution; and to exercise it in fact would be an act of arbitrary power wholly repugnant to the principles upon which our system of government is based.

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* "The Superintendent of the national cemeteries shall be selected from meritorious and trustworthy soldiers, either commissioned or enlisted men of the volunteer or regular Army, *who have been honorably mustered out or discharged from the service of the United States*, and who may have been disabled for active field service in the line of duty."

† "All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders according to the rules and discipline of war."

So obvious to my mind is all this, that, (in view of the terms of Sec. 4874 of the Revised Statutes, in regard to Superintendents of National Cemeteries,) I should never have thought of recommending the reference of the question of their amenability to military trial, to the Attorney General, had it not been for the recent opinion (contained with the accompanying papers) of that official in, (or rather relating to, for the opinion was in terms general,) the case of *Barth*, to which the other papers, herewith returned, refer. It was the existence of this opinion alone that induced such recommendation, and it is the fact alone that it still exists which induces the request with which this communication concludes.

2. *Chas. H. Barth* was a quartermaster's clerk, employed by Lieut. Col. A. R. Eddy, Depty. Quartermaster General, and chief quartermaster of the military Department of California, stationed at San Francisco. Barth was not an officer of the army nor an enlisted man, but a civilian clerk paid out of the annual appropriation for the quartermasters department of the Army. Employed at San Francisco, in time of peace, his *status* was precisely that of any civilian clerk employed at the present time in the War Department at Washington; his only relation to the military service being that he performed labor for the United States in the military branch of the executive department of the government. Barth, having been detected in the forgery of the name of a civilian contractor on checks issued to his order by the United States, through Lieut. Col. Eddy, and in the utterance of these checks when forged, by selling them to a money broker in San Francisco and getting the money upon them, (as also of the falsification of official papers in violation of Sec. 5438, Rev. Stats.,) was (legally as I hold,) placed in *military arrest* by the order of the Department Commander, General Schofield, and the question was thereupon raised by him whether Barth could legally be tried by a court martial. This Bureau gave its opinion unhesitatingly in the negative, but General Schofield, who took a contrary view, having induced the question to be referred by the Secretary of War to Attorney General Taft, that official, on June 2, 1876, rendered a very brief opinion in which he concurred in the view of Genl. Schofield. This opinion, which in effect held all the clerks—male and female

—of the War Department subject to the military jurisdiction and to trial by court martial, and the principle of which was indeed to hold the Secretary of War, whose relation to the "land forces" is of the most intimate character, as also the President who is commander in chief of the Army, similarly amenable, appeared to me so extraordinary, that, believing it to have been issued through some oversight, I informally requested the Attorney General to reconsider the question passed upon. This he readily consented to do, and—as I have been informed—had done so in part, when he went out of office. His opinion, therefore, of June 2, 1876, remains unrevoked.

[It may be noted here that Barth escaped from the military arrest, and has since been at large. The State Department has recently been requested by the Secretary of War to procure his extradition from the Hawaiian government.]

3. In view of the facts thus detailed, I have the honor to request, and, in view of the importance of the question of constitutional law involved, to urge, that the Secretary of War will renew the reference to the Department of Justice of the question of the amenability to the military jurisdiction of Superintendents of National Cemeteries, originally submitted by the Hon. Secretary to the Attorney General on Dec. 6th last, but on which no opinion has yet been given: And further that he will request at the same time a review of the opinion relating to the case of Barth, and a further opinion therein, in case it should be deemed proper to withdraw the existing one.

By a reference to Secretary Cameron's said communication to the Attorney General of Dec. 6, 1876, it will be seen that he requested in substance that the two cases should be considered together, and an opinion be furnished upon both, in connection and at the same time.

A brief memorandum of authorities upon the question of jurisdiction above indicated is herewith furnished; as also Remarks upon the Argument of Genl. Schofield in the case of Barth.

I have the honor to remain

Very respectfully

Your obt. svt.,

W. M. Dunn,
Judge Advocate General.

"Under the Constitution of the U. S., (See Amendments —Arts. V & VI), Congress has no power to subject any citizen of a state to trial and punishment by military power in time of peace." Atty. Gen. Hoar, XIII Opinions of Attys. Gen. 63.

In XIV. Opinions, 22-24, Atty. Gen. Williams construes the 63d (then numbered the 60th) Article of War as referring to a time and theatre of war, and holds civil employees serving with the troops in an Indian war, amenable to the military jurisdiction, under this Article. The inference is that employees not so serving, (but serving in time of general peace, and—even if Indian hostilities were going on at the time—at a place not in the "field" but wholly remote from the theatre of any hostilities,) cannot legally be made so amenable.

In Stuart *v.* United States, 18 Wallace, 84, 88, it is held that a contractor for transportation of military stores from post to post "remote from the seat of actual war," was not performing a military service, and was no part of the Army. (And see reference to this case in 10 Ct. of Claims, 419.)

The only adjudicated case known to me in which the jurisdiction of a military court over a civilian clerk or employee is sustained, is that of *Matter of John Thomas*, U. S. Dist. Ct. for the Southern Dist. of Mississippi, 1 Chicago Legal News, 245. Thomas was a clerk to an Army paymaster. I think, of course that the ruling holding him amenable to trial by court martial was entirely unsound, but I believe that it was in a considerable degree influenced by the fact that Mississippi was at the time under a military government, under the Reconstruction Laws, and the party was viewed thus—erroneously as I think—as practically serving in the field.

[The ruling in U. S. v. Bogart, 3 Benedict, 257, proceeded on the view that a paymaster's clerk in the *Navy* was a regular uniformed officer of the Navy, having rank as such, &c., and thus not a civilian at all. This case is therefore not in point.]*

* If it be held that Barth is or was amenable to military jurisdiction and trial, then every clerk in the War Department at Washing-

In General Schofield's argument he refers to the phraseology of the present 60th Article of War—"any person in the Military service of the United States," as if it extended the military jurisdiction to persons other than officers and enlisted men. In my opinion, this phrase is simply to be regarded as a condensed form of expression for the phrase employed in the original Act, (Mch. 2, 1863, ch. 67, sec 1.)—"any person in the land (or naval) forces of the United States, or in the militia in actual service of the United States in time of war." By these words Congress clearly intended the officers and soldiers of the army (including militia when regularly called into the United States service,) and the officers and seamen of the navy. The Commission on the revision of the Statutes were not authorized to change the existing law, but they could condense and simplify, and, in my opinion, this is all that they have done in the present 60th Article; the term now employed being merely a brief form of the more elaborate form, but each being simply a description of the purely military force of the United States, composed of officers and enlisted men. A similar condensation of expression occurs in the corresponding Article of the Naval Code.

I am—further—wholly unable to perceive the bearing, upon the present question, of the "or other person," etc., cited by General Schofield from the clause before the last of the 60th Article. I construe this as making punishable officers or soldiers who may purchase, etc., the articles mentioned from other officers or soldiers, or from any of the class of civil persons commonly employed in connection with armies, as teamsters, officers servants, camp-followers, etc. I consider the provision to have no more significance in reference to the question at issue than if, instead of the expression, "or other person," etc., the Article had said—*or from any civilian*. To illustrate: Suppose an Act of Congress should provide that if a soldier committed an assault

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ton, male or female, is so amenable: the same may also be, with equal reason, held of the Secretary of War, whose relations to the land forces are closer than can be those of any clerk in Quartermaster or any other branch of his Department; and may be held also of the President who is commander in chief of the Army!

upon a citizen of the United States, he should be tried by court martial, and punished in a certain way. In my opinion there would be just as much reason for holding that under this Act the citizen could be tried by court martial and punished as prescribed for committing an assault upon the soldier, as for holding that the clause indicated of the 60th Article furnishes any color of authority for the trial by court martial of a civilian clerk situated as was Barth.

I cannot therefore perceive that the Revised Statutes makes any change whatever in the law as to the particular under consideration. But even if they did; even if in a hundred Articles or provisions they in terms authorized the trial of civilians by court martial, such a trial would still be utterly illegal because in contravention of the letter and spirit of the Constitution. The question is thus a constitutional not a statutory one. At the same time I am unable to discover in the Statutes any attempt whatever to contravene the Constitution in this respect.

W. M. Dunn,
Judge Advocate General.

War Department,
Bureau of Military Justice,

June 16, 1877.

Hon. Geo. W. McCrary,
Secretary of War.

Sir: I have the honor to return herewith the papers referred to this Bureau in the case of Wm. G. Crafts, and to express the opinion that such case is not within the jurisdiction of a court martial, and that the prisoner is entitled to be immediately released by the military authorities, or committed to the custody of the U. S. Marshal.

This Bureau has always been of opinion that the military jurisdiction cannot legally be extended to a case of a civilian except upon the rare and extraordinary occasion of a state of war or of the existence of martial law, and then only for crimes committed upon the theatre of war or within the scope of such law. The 63d Article of War is deemed to

recognize this principle, in providing that retainers to the *Camp* and persons serving with the *armies in the field*, though not enlisted soldiers, shall be subject to military law; thus evidently limiting such amenability to civil persons serving with troops engaged in actual war, and for offences committed upon its theatre.

The within named civilian, Wm. G. Crafts, was, at the time of his offences, not serving with an army in the field, but was a clerk to an officer acting as quartermaster stationed at a military post, within the limits, not of a Territory but of a State—Nebraska. This post is designated "Camp Robinson," but it is not a camp in a warlike sense, but a permanent station, having been established for at least three years. The locality of the post was not within the theatre of an Indian war; nor were the troops at or near the post engaged in war. The Indians at Red Cloud Agency, near by, were not at war with the United States.

The statement in the papers relied upon as giving the court martial jurisdiction is that—"the troops stationed at that post were "operating 'in the field' in the immediate presence of various bands of "Indians, many of whom were lately from the war path." This statement is a mixture of inference with fact. While it is no doubt true that some of the Indians at the Agency had recently been in hostility with the United States, it is a conclusion only of the writer that the troops stationed at the post were "operating in the field." But if indeed "operating," in the restricted sense of guarding the frontier and holding themselves in readiness to repell any disorder at the Agency, or to march against inimical Indians in the event of war or active hostilities, they were not, in the opinion of this Bureau, so engaged in actual warfare as to authorize courts martial convened at their station to take cognizance of offences committed by civilians there commorant.

It is to be remarked that not only is the right of a civilian to be tried by the civil courts one which cannot constitutionally be infringed upon except under circumstances most clearly and indubitably subjecting him to military law and government, but the theatre of an Indian war is necessarily peculiarly limited, being confined to the locality of the particular tribe or tribes at war with the United States. The

military jurisdiction in a case like the present, is thus to be more cautiously extended than in the case of a general war.

It is further to be observed that even if the jurisdiction of a court martial could legally have been stretched so as to include this case at the date of the alleged offences, March 31, it would be too late to exercise such a jurisdiction now when hostilities with Indians within the Department of the Platte have almost ceased, and a state of war can scarcely be said to exist there except so far as relates to certain distant roving bands. The jurisdiction of a court martial under the 63d Article can, it is held, be exercised only pending the war, during and upon the scene of which the offence was committed.

It is thus the opinion of this Bureau that no sufficient authority is shown for subjecting the civilian named to the exceptional jurisdiction of a military court. His offences—conspiring with contractors, &c, to defraud the United States—were not military ones, but such as are clearly cognizable, under Sec. 5438, Revised Statutes, by the U. S. District Court, which meets at Omaha, (the entire State of Nebraska being included within the judicial district,) on October 10th next. The recommendation of this Bureau would therefore be that the papers in the case be transmitted to the Department of Justice, with the request that the necessary instructions be given for the arrest of the prisoner by the Marshal and his prosecution before said Court.

In view however of the opinion of Attorney General Taft in the case of Barth, of June 2d, 1876, which the Judge Advocate General, believing it to have been inadvertently issued, has heretofore desired the Secretary of War to ask to have reconsidered, it is urged that the Hon. Attorney General be requested to furnish the Secretary of War with an opinion as to whether a court martial may legally assume jurisdiction of the case of the within named civilian clerk, Wm. G. Crafts.

W. M. Dunn,
Judge Advocate General.

APPENDIX D

Significance of Military Trials of Civilians in the 1790's in Terms of Concepts Then Prevailing

What follows below should, logically, have been included in the text; we request that the Court treat the discussion as though contained in a Supplemental Brief filed pursuant to Rule 41(5).

1. One of the apparent mysteries of the military law of the 1790s is why, when the Articles of War then in force vested in Congress the ultimate power to approve sentences in time of peace involving death and sentences extending to the dismissal of an officer, the Commanding Generals of the time, notably Major General Anthony Wayne, ordered such sentences into execution immediately, without any reference whatever to Congress. See 72 Harv. L. Rev. 15.

2. AW 2 of 1786 provided, in pertinent part—

> "* * * neither shall any sentence of a general court-martial in time of peace, extending to the loss of life, the dismission of a commissioned officer, or which shall either in time of peace or war respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the secretary at war, to be laid before Congress for their confirmation or disapproval, and their orders on the case. * * *"

3. By a whole series of acts, beginning in 1789 and extending through 1803, the Continental Articles of War—those of 1776 as amended in 1786—were made to apply to the existing army, and to certain authorized increases in the army's strength. Sec. 4 of the Act of Sept. 29, 1789, c. 25, 1 Stat. 95, 96; Sec. 13 of the Act of Apr. 30, 1790, c. 10, 1 Stat. 119, 121; Secs. 3 and 10 of the Act of Mar. 3, 1791, c. 28, 1 Stat. 222, 223; Sec. 11 of the Act of Mar. 5, 1792, c. 9, 1 Stat. 241, 242; Sec. 4 of the Act of May 9, 1794, c. 24, 1 Stat. 366; Sec. 14 of the Act of Mar. 3, 1795, c. 44,

1 Stat. 430, 432; and see Winthrop *14 (p. 23 and note 43 of the 1920 reprint) for further enactments from 1796 to 1803. On three of the occasions specifically cited, the existing Articles were reenacted "so far as the same are applicable to the constitution of the United States" (*supra*, p. 53).

4. Not until 1796 did the Congress vest in the President the power to act on death and dismissal cases in time of peace, and on general officer cases at all times. Sec. 18 of the Act of May 30, 1796, c. 39, 1 Stat. 483, 485.

5. Yet General Wayne regularly confirmed and ordered executed numerous death sentences, some while still at Pittsburgh in 1792 (e.g., the case of Sgt. Trotter, *supra* p. 50, at note 10), and similarly confirmed the dismissal of numerous officers. E.g., Pittsburgh, July 30, 1792, 34 Mich. Pion. & Hist. Coll. 354; Hobson's Choice, Sept. 10, 1793, *id.* at 475-476; Green Ville, May 6, 1795, *id.* at 608; Green Ville, Nov. 28, 1795; *id.* at 654-657.

6. The foregoing actions were not surreptitiously taken. Writing from Pittsburgh in September 1792, General Wayne advised the War Department of the execution of three death sentences. Secretary Knox replied, "The sentences of the Courts Martial you have confirmed, seemed absolutely necessary—Hereafter it is to be hoped there may be less call for the punishment of death." 1 Knopf, ed., *Campaign into the Wilderness: The Wayne-Knox-Pickering-McHenry Correspondence*, 81, 88, 90. The Secretary frowns at the necessity; he does not question the legality.

7. It may be assumed that the Secretary of War was similarly advised of the execution of sentences to dismissal in officer cases, the effect of which was to create vacancies in the establishment to be filled by promotion or by original appointment; we have not had time to examine this aspect.

8. It cannot be supposed that Secretary Knox was unaware of the terms of AW 2 of 1786, inasmuch as he was Secretary at War under the Confederation when the amend-

ments of May 31, 1786, were adopted by the Continental Congress to replace Section XIV of the 1776 Articles of War. See 30 J. Cont. Cong. 145-146, 316-322. Nor can it be supposed that Secretary Knox tolerated irregularities in military proceedings; to the contrary.

In March 1786, when a death sentence adjudged by a court-martial had been submitted to Congress for its action (Sec. XIV, Art. 8, of 1776), Secretary Knox pointed out that the court-martial had been illegally constituted, and recommended that a court of inquiry be appointed to investigate the matter and that the officer responsible be suspended in the meantime. 30 J. Cont. Cong. 119-121.

And, in the following year, the Secretary recognized that an officer separated from the service after the demobilization of 1783 was thereafter not amenable to military trial. 30 J. Cont. Cong. 666-668.

9. What statutory authority did General Wayne have to order death sentences into execution? Why did Secretary Knox consider his actions legal? On the face of the provisions of law then in force, these were matters to be laid before Congress until 1796, at which time the power to approve death sentences in time of peace was transferred to the President. What is the answer to this tantalizing puzzle?

10. We have searched the definitive edition of the Journals for the Continental Congress for the years 1786-1789, we have thumbed volume 1 of the Statutes at Large up to the time that the confirming power was transferred to the President in May 1796, and we have similarly thumbed vol. 1, American State Papers—Military Affairs for the same period: We have found neither legislative enactmen, nor executive directive conferring on the commanding general the powers that were retained by the Congress in AW 2 of 1786. And we have found no discussion of the power to act on court-martial sentences to death or dismissal in the legislative history of the Act of May 30, 1796, *supra*, Section 18 of which transferred that power to the President. 5 Annals of Congress 905-913, 1418-1423, 1427-1430; 2 H. of R. J. 528, 529, 532, 566-570, 572, 573, 581, 583, 590; 2 Sen. J. 245, 248, 252, 263, 265, 267, 278.

11. Plainly, both General Wayne and Secretary Knox considered that the confirming powers exercised by the former in death and dismissal cases were legally exercised. And, on the face of AW 2 of 1786, those powers could only have been legally exercised in time of war. It must follow that both individuals believed that the period 1792 to 1796 *was* a time of war.

12. Contemporaneous documents support that view, particularly when the chronology of the time is borne in mind.

a. Indian wars had in fact been endemic for the first half of the 1790s, from the time that Harmar was defeated, through a similar defeat of his successor St. Clair, through the period of Wayne's preparation, and until Wayne's victory at Fallen Timbers in 1794 was capped by the Indians' submission at Greenville in 1795. See Spaulding, *The United States Army in War and Peace*, 118-121; Upton, *The Military Policy of the United States* (1917 ed.) 77-78, 79-80, 83; Jacobs, *The Beginning of the U. S. Army, 1783-1812*, 40-181.

b. Although the debates on the Act of May 30, 1796, *supra*, "To ascertain and fix the Military Establishment of the United States," are not particularly illuminating, and rehash the hackneyed anti-militarism of the previous decade—e.g., *per* Giles of Virginia, "the very idea of a Military Establishment was to him a disagreeable thing" (5 Annals of Congress 912)—they do reflect the idea that, the Indian war having terminated, there was no more need for a War Establishment, but only for a Peace Establishment. E.g., references at 5 Annals of Congress 906, 908, 909, 913, 1418, to a "Peace Establishment"; and the following: "When the Military Establishment was raised to its present amount, it was an account of an Indian war. That war was now at an end" (909); "if that number was sufficient to carry on war, it was surely not necessary to have an equal number in peace" (910); "It was supposed that a Major General was necessary for a War Establishment, but not for a Peace Establishment" (1421-1422); "They were now upon a Peace Establishment—the last was a War Establishment" (1430).

c. A little earlier, in the House report of March 25, 1796 on "Organization of the Army," there was included a letter from Governor William Blount of the Southwest Territory to the Secretary of War, dated November 2, 1795, which remarked that "Peace now *actually* exists between the United States and the Indian tribes." 1 Am. St. Pap. Mil. Aff. 112 (italics in original).

d. In 1795, Secretary of War Pickering (who had succeeded Knox) felt that a state of war still existed.

This is evidenced by an entry in 1 *Orderly Book of the Corps of Artillerists and Engineers* (MS., U.S.M.A.) 118, 119, dated August 25, 1795, which records a death sentence passed by a court-martial on a deserter who pleaded guilty. Major Tousard, the Commandant, remarking that "The Commandant having maturely compared the Letter of the Secretary of War of the 7th Instant which says that since the Commencement of the Indian War, the United States have been in a situation that exclude the Idea of its being a time of peace," confirmed the sentence—but on the next day postponed its execution. 1 *id.* 120. (A month later, the culprit was pardoned by the President and restored to duty, following which Major Tousard offered an amnesty to similar offenders. 1 *id.* 138, 139.)

13. It was Maitland who "Again and again * * * emphasised the danger of imposing legal concepts of a later date on facts of an earlier date * * *. We must not read either law or history backwards. We must learn to think the thoughts of a past age—'the common thoughts of our forefathers about common things.'" Cam. ed., *Selected Historical Essays of F. W. Maitland* (1957) xi.

14. The conclusion is accordingly inescapable that, by the standards of the 1790s, the years 1792 to 1795 or 1796 were a time of war, and were so regarded by contemporaries. By the later standards of the 1870s, an Indian War on the frontier did not authorize trial by court-martial of civilians in the rear areas. 16 Op. Atty. Gen. 13; 16 *id.* 48; Appendix C, *supra*, pp. 119-127, *passim*. By the standards just pronounced at the last Term (*Lee* v. *Madigan*, 358 U.S. 228), the 1790s were not a time of war at Pittsburgh or West

Point. But to the men of the 1790s, those years were in their estimation a time of war, throughout the nation and not merely on the actual theater of operations.

15. It follows that, in the minds of those responsible therefor, the trials of civilians by court-martial that appear in the Wayne Orderly Book (Appendix B, *supra* pp. 107-113) represented trials in time of war, and were not considered by them as having taken place in time of peace. Consequently, viewing those trials in their setting, they must be regarded as entirely similar to Washington's courts-martial of civilians during the Revolution (Appendix A, *supra*, pp. 103-105). Therefore the civilian trials of the 1790s, accurately evaluated, cannot fairly be considered as even historical precedents for the peacetime military jurisdiction now asserted by The Pentagon.

16. We request that Point III D, *supra* pp. 36-54, which was written in terms of modern concepts of war and peace, be now read in the light of the present Appendix.